Supreme Court, U.S.
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In the Supreme Court of the United States

Connells Prairie Community Council,
Sharon Gain, et al.,

Petitioners

v.

State of Washington, et al.,

Respondents

To the Washington State Supreme Court
On Petition for Writ of Certiorari

Petition for Writ of Certiorari

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29

ISSUES PRESENTED

ISSUE ONE. Whether the qualified "good faith" immunity of Washington's "anti-Strategic Lawsuit against Public Participation (SLAPP)" statute, RCW 4.24.500, .520 and former .510 is unconstitutional under the First and Fourteenth amendments.

A. The plaintiffs' petitioning of government was absolutely immune from civil suits for damages since the 1991 U.S. Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.* and RCW 4.24.500-.520 was unconstitutional since 1991. The courts' failure to address the constitutional issues prolonged litigation and "chilled" or violated plaintiffs' First and Fourteenth Amendment constitutional rights.

B. Amended RCW 4.24.510 is constitutional and should be the "law of the case."

ISSUE TWO. Whether the State, with the enactment and judicial interpretation of RCW 4.24.500-.520, and the judiciary's joint participation with private individuals continued the SLAPP 'under color of law' deprived the groups of their First and Fourteenth Amendment constitutional rights.

A. Every proceeding, order or act was in the clear "absence of legal authority," or subject matter jurisdiction, because the Groups were immune from the filers' 1999 civil suit under the First Amendment and "clearly established " common law of the U.S. Supreme Court 1991 decision in *Omni.*

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B. The defendants violated the Groups' First Amendment rights with the enactment and judicial interpretation of RCW 4.24.510 and when they filed or acted to continue the SLAPP against the Groups.

C. Former RCW 4.24.510, .500 and .520 deprived the plaintiffs of their 14th Amendment rights of equal protection and due process.

ISSUE THREE. Whether the plaintiffs, as a matter of law, are entitled to compensatory and punitive damages and remedies pursuant to 42 USC 1983 and former and amended RCW 4.24.510.

A. Defendants, which include government entities and private parties, are liable for 42 USC §1983 compensatory and punitive damages for the injuries sustained by the Groups when the defendants filed and/ or continued the SLAPP.

B. The Court should impose punitive damages against respondents when respondents, with intent, malice, and "under color of law," deprived the Groups of their constitutional rights of immunity from the SLAPP.

C. Common law judicial immunity does not protect judicial officers and represented governments from 1983 claims for damages if the courts fail to dismiss a SLAPP against citizens predicated on protected First Amendment activities.

D. Whether the Supreme Court should determine damages in the present case and impose CR 11 sanctions against the attorneys.

PARTIES TO THE PROCEEDING

Petitioners

The lead petitioner in this action is Sharon Gain, group member and attorney who represented the groups and their Presidents before the Washington Supreme Court. Petitioners also include individual defendants in the original action, Connells Prairie Community Council (CPCC) President Jonathan Salisbury and wife, Jane Doe Salisbury, Pierce County Rural Citizens Association (PCRCA) President William Wright, CPCC, PCRCA, and John and Jane Does 1-10 for each group and Kenneth Gain, or 46 petitioners.

Respondents

Respondents are the plaintiffs in the original action, Right Price Recreation, LLC and Michael R. Mastro. Additional respondents for the counterclaims are 1) the officers and Justices of the Washington State Supreme Court, in their official capacities---Chief Justice Gerry Alexander, Justices Chambers, Owens, Bridge, Sanders, Ireland, Madsen, Johnson and Fairhurst, Commissioner Crooks, and Court Clerks Merritt and Carpenter 2) Washington State Court of Appeals, Division II's Judges in their official capacities---Judges Armstrong, Bridgewater and Houghton; 3) Pierce County Superior Court Judge Kitty-Ann van Doorninck, Pierce County Deputy Prosecutor Jill Guernsey and Pierce County Hearing Examiner Stephen Causseaux, in their official capacities; and 4) Right Price attorney Matthew Sweeney, former counsel of record for CPCC and PCRCA Shawn Newman and CPCC attorney Michael Gendler.

CORPORATE DISCLOSURE STATEMENT

Petitioner Connells Prairie Community Council (CPCC) is a nonprofit corporation whose members are homeowners and residents in the rural Bonney Lake and Lake Tapps area, Pierce County, Washington. There are no parent corporations or publicly held companies or stock. CPCC's funding is solely from member contributions. Members formed CPCC in 1995. CPCC remains an active nonprofit corporation on file with Washington's Secretary of State. Petitioner Jonathan Salisbury is CPCC's President.

Petitioner Pierce County Rural Citizens' Association (PCRCA) is a nonprofit corporation whose members are residents in the rural Bonney Lake and Buckley area of Pierce County, Washington. There are no parent corporations or publicly held companies or stock. PCRCA's funding is solely from member contributions. Members formed PCRCA on February 24, 1998. PCRCA remains an active nonprofit corporation on file with Washington's Secretary of State. Petitioner William Wright is PCRCA's President.

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OPINIONS AND ORDERS BELOW

The two published opinions in this case are included as attached Appendix A and B at pages 1 and 15. The published opinions are the Washington Supreme Court's opinion *in Right Price v. Connells Prairie et al*, 146 P.2d 370 (May 16, 2002) and the Washington State Court of Appeals, Division Two, opinion in *Right Price v. Connells Prairie et al* 105 Wn.App. 813, 21 P.2d 1157 (April 20,2001). The Washington Supreme Court assigned three case numbers--71099-6 (original interlocutory appeal), 72876-3 (appeal from Superior Court after remand—dismissed without prejudice) and 73602-2 (dismissed with prejudice by Clerk's Ruling on March 28, 2003). App. K at 44.

Petitioners are appealing the original Washington Supreme Court decision of May 16, 2002 and subsequent orders after remand. The August 26, 2003 appeals filed with this Court were of the Washington Supreme Court's May 28, 2003 denial of the Motion to Modify Clerk's Ruling and May 28, 2003 Clerk's Ruling imposing sanctions and denying review of the Petition for Extraordinary Writ and Summary Judgment. Appendix I, J, K at 40, 42, and 44, respectively.

Subsequently, the Court issued En Banc orders on September 8, 2003 denying all motions, including the Petition for Extraordinary Writ and Summary Judgment, while referring petitioner Gain to the Washington State Bar Association for "investigation." Petitioners request that the Court also consider the September 2003 orders if review is granted. Appendix D and E at 31 and 33.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A. The First Amendment of the United States Constitution states:

> "Congress shall make no law abridging the freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed."

U.S. CONST. amend. I.

B. The Fourteenth Amendment of the United States Constitution states:

> "No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the U.S.; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. amend. XIV, § 1.

C. 42 U.S.C. § 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ***subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

D. The Revised Code of Washington (RCW) 4.92.090 (Waiver of State sovereign immunity) states:

> "The State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."
> ***Note: The language of RCW 4.96.010, which waives local government immunity, is identical

E. The Revised Code of Washington (RCW) 4.24.500 ("Anti-SLAPP"statute) states:

> "The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies."
> (Washington's Anti-SLAPP qualified immunity statute enacted in 1989---qualified immunity not amended in 2002.)

F. Former Revised Code of Washington (RCW) 4.24.510 ("Anti-SLAPP"statute) states:

"A person who in good faith communicates a complaint or information to any agency of federal, state, or local government regarding any matter reasonably of concern to that agency shall be immune from civil liability on claims based upon the

good faith communication to the agency. A person prevailing upon the defense provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense." (Washington's former Anti-SLAPP qualified immunity statute enacted in 1989, amended 2002– amendment effective June 13, 2002).

G. Amended Revised Code of Washington (RCW) 4.24.510 states:

INTENT—2002 c 232:

Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights granted under Article 1, Section 5 of the Washington state Constitution.

Although Washington adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, United States supreme court has made it clear that, as long as government petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. Chapter 232, Laws of 2002 amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is

designed to have some effect on government decision making.

(Anti SLAPP statute amended 2002, effective June 13, 2002. Amended statute added "branch" of federal, state or local government. "Good faith" language stricken and "shall be" immune changed to "is" immune. Mandatory statutory damages of $10,000 added but may be denied if the court finds the complaint or information not communicated in good faith.)

H. Revised Code of Washington (RCW) 4.24.520 states:

> "In order to protect the free flow of information from citizens to their government, an agency receiving a complaint or information under RCW 4.24.510 may intervene in and defend against any suit precipitated by the communication to the agency. In the event that a local government does not intervene and defend against a suit arising from any communication*** the office of the attorney general may intervene and defend against the suit. An agency prevailing upon the defense provided in RCW 4.24.510 shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense. If the agency fails to establish the defense provided for in RCW 4.24.510, the party bringing the action shall be entitled to recover from the agency costs and reasonable attorney's fees incurred in proving the defense inapplicable or invalid."

(Washington's 1989 anti-SLAPP statute not amended in 2002—retains qualified immunity).

I. Washington Rule of Appellate Procedure (RAP) 2.5 states:

(a) Errors raised for the first time on review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, ***(3) manifest error affecting a constitutional right.

(c) Law of the Case Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of later review.

J. Restatement (Second) of Torts § 874A states:

"When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action."

SUPREME COURT JURISDICTION

The plaintiffs filed timely appeals and proceeded in good faith over four years. The tortured, convoluted nature of the original case arose after the Supreme Court granted review on October 30, 2001. The Groups' demands for relief expanded after the courts and the parties proceeded to act on bad faith after October 30, 2001. The Court determined that the Groups were immune from civil lawsuits in its May 16, 2002 ruling but dismissed the entire case with prejudice by Clerk's Ruling, dated March 28, 2003, without a remedy. App. K at 44. Department Two subsequently denied the Groups Motion to Modify on May 28, 2003. App. I at 40, App. J at 42. The Groups filed for discretionary review in 2001, a "right of appeal" on 7-26-02 (dismissed "without prejudice") on October 29, 2002, and a Motion to Recall the Mandate on 7-26-02 (denied on September 4, 2002). Pet.App. 62, 63. The Groups requested a "final decision" that determined all the rights and remedies between the parties by means of a statutory writ because the Groups exhausted all other remedies at law. Pet.App. 195, 227. In addition, the Groups filed an Amended Motion to Recall the Mandate and additional pending motions in June and July 2003 *See* Pet.App.395, 401, 406, 419, 424, 425.

The Clerk sanctioned Gain $2500 for filing the amended Petition on June 3, 2003. App. H at 38. The Clerk also referred to the court the issues of additional sanctions and the question of referring petitioner attorney Gain to the Washington State Bar for investigation for disciplinary action. App. G at 36. By order dated September 8, 2003, the Supreme Court denied all motions, entered judgment for sanctions of $3,750 against petitioner Gain and referred Gain to the Washington State Bar for investigation. App. C. at 30, App. D at 31, App. E at 33.

The May 28, 2003 dismissal with prejudice and the September 8th denial of all motions are appealable final decisions under 28 USC 2104 and the Constitution's Article

III § 2 because the case "arises under" the Constitution and federal constitutional rights. Pet.App.15. Finally, the Court committed clear error when amended, rather than former, RCW 4.24.510 should be the "law of the case."

STATEMENT OF THE CASE

Right Price LLC (hereafter Right Price or filers indicates Right Price and Michael R. Mastro) sued two nonprofit organizations, Connells Prairie Community Council (CPCC) and Pierce County Rural Citizens Association (PCRCA) and their Presidents, alleging 1) slander; 2) commercial disparagement; 3) tortious interference; 4) tortious interference with the hearing process; and 5) civil conspiracy. Pet.App 711. The suit is based upon the groups' speech before the Pierce County Council on November 3, 1998, opposing Right Price's plat applications to Pierce County. Pet.App 711; *See*, Env. # 2 Video of Council hearing of November 3, 1998. The Groups identified the lawsuit as a Strategic Lawsuit Against Public Participation (SLAPP) and claimed statutory and constitutional immunity from suit, pursuant to the First Amendment and RCW 4.24.500-.510 with the Responses to Discovery and Answer, Affirmative Defenses and Counterclaims dated July 21, 1999. Pet.App. 720. The counterclaims included, among others, abuse of process, malicious prosecution and civil rights violations. Pet.App. 725-764.

Over the next three years in the trial court, Court of Appeals and Supreme Court, petitioners consistently maintained the same claims of immunity and counterclaims; they also challenged the constitutionality of the "good faith" qualified immunity of former RCW 4.24.500- 4.24.520. Pet. App. 1, 15, 873-894, 905-906. When the Supreme Court issued its opinion on May 16, 2002, it upheld "good faith" immunity and declined to consider the constitutional issues or amended RCW 4. 24. 510, which provided absolute

immunity and additional remedies. Pet.App. 15. The opinion did not address the issues of counterclaims or CR 11 sanctions. *Id.* The Supreme Court issued the Mandate on June 13, 2002, the effective date of amended RCW 4.24.510, and remanded the Groups to Pierce County Superior Court for determination of attorney fees and dismissal. App. P 64.

Judge Van Doorninck conducted two hearings on 7-19-02 and 7-26-02. *Id.* Newman presented orders for the 7-19-02 hearing, which Gain declined to approve because of numerous procedural irregularities. App. M, 55, 57. Notably, Right Price opposed any and all requested relief awarded by the Supreme Court. Pet.App. 555, 567, 1277, 1283. PCRCA filed an appeal; the Clerk dismissed the appeal without prejudice for failure to pay the filing fee of $250 and consolidated the original appeal, No. 71099-6, with the 7-26-02 appeal No. 72876-3. However, on September 4, 2002, Department One denied the motion without comment. Pet.App. 63.

The Groups' Presidents filed claims with the State and Pierce County Risk Management for damages on December 2, 2002 and waited the requisite sixty days. App. 19. The Groups filed and served government entity defendants, Judge van Doorninck and Right Price in Pierce County Superior Court on February 19, 2003, as required by state statute; the Groups directed the heading of the complaint to the Supreme Court. Pet.App.137. The complaint requested that the Supreme Court join successor in interest, Michael Mastro, Pierce County, Judge Van Doorninck and the State of Washington as third-party defendants for the counterclaims. *Id.* The Groups filed a Notice of Appeal in the Pierce County Superior Court for Direct Review on March 3, 2003. Pet.App. 69. The Groups previously exercised their "right of appeal" when they appealed the trial court orders of July 19, 2002 and July 26, 2002. Pet.App. 49. The Clerk dismissed the March 2003 appeal "with prejudice" and imposed sanctions of $500 on attorney Gain personally by Clerk's Ruling dated March 28, 2003. App. K at 44.

WHY THE COURT SHOULD GRANT REVIEW

New York trial judge, Nicholas Colabella, characterized SLAPPS and emphasized the importance of an early dismissal when SLAPPS are:

> [S]uits without substantial merit, that are brought to 'stop citizens from exercising their political rights or to punish them for having done so.' SLAPP suits function by forcing the target---in this case the two citizens groups---into the judicial arena where the SLAPP filer foists upon the target the expense of a defense. The longer the litigation can be stretched out, the more litigation can be churned, the greater the expense that is inflicted, and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a Pyrrhic victory. Those who lack the financial resources and emotional stamina to play out the "game" face the difficult choice of defaulting, despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance, targeted in such suits, or who have witnessed such suits, will often choose in the future to stay silent. Short of a gun to the head, a greater threat to the First Amendment expression can scarcely be imagined. [September 24, 1999 RP at 5-6 quoting Pring at 11;*Gordon v. Marrone*, 155 Misc. 2d 726, 736, 590 N.Y.S.2d 649, 656 (1992).]

In 1989, Washington State passed the first modern anti-SLAPP law because of the Brenda Hill case.[1] Because of the

[1]According to Professor George Pring, originator of the term SLAPP, "In 1987, when Hill found she might lose her home because her subdivision

the marked rise of SLAPPs nationally over the past thirty years, nearly every state [2] has enacted, or is in the process of enacting, similar statutes. State legislatures have struggled with legislation or amended legislation (California and Oregon are examples) to counter the growing phenomenon of frivolous lawsuits filed to chill individuals and citizen groups who openly express their views to government agencies. A number of states have amended their original "anti-SLAPP" statutes because the courts are not dismissing SLAPPs, or awarding statutory remedies. *See*, California and Oregon amendments and opinions on internet site(s)---California Anti-SLAPP Project--for contemporary legislation. The states have devised a number of "special procedures" that have proven ineffective, such as "Special Motions to Dismiss" or misinterpretations of applicable law. *See*, Advisory Opinion of New Hampshire State Supreme Court to the Legislature on California Anti-SLAPP Project.

The few targets who choose not to "settle," by promising not to participate in government affairs, have to overcome severe obstacles to obtain a remedy after years of meritless litigation. *Id. See*, also attached Env. #1—SLAPPS: Getting Sued for Speaking Out," by Professors George Pring and Penelope Canan. Most states encourage "public participation" and citizens rightfully believe that they have the right to criticize and speak freely regarding issues of public importance. If courts allow persons to misuse the

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officials, who eventually collected some $351,000 in back taxes. The outraged developer swore it would "sue her till we are insolvent," and its SLAPP was not tossed out of court until 1993. Outraged at the company's action, freshman state legislator Holly Myers introduced "the Brenda Hill Bill" in 1989, and it passed unanimously on the wave of anti-SLAPP media. [Pring at 191-193].

[2] For a detailed and extensive review and update of anti-SLAPP legislation legislation in individual states, see the Web site of the California Anti-SLAPP Project, as well as other Web sites-keyword SLAPP.

judicial process by prolonging litigation to "chill" opposition, the courts must necessarily provide notice to the public that if citizens participate, they do so at the risk of months or years of expensive litigation, as well as an invasion of their privacy through the invasive discovery process and they must be prepared to prove the truth of every statement or opinion rendered on the subject. What citizen would risk such a "gun to the head"?

Judge Corabella's characterization of the enormous "ripple effect in our society" cannot be ignored when the permanent paralysis of citizen apathy is irreversible. The case before the Court calls for "strong medicine" to put an end or brake on the abuse of government entities who violate the fundamental constitutional and human rights of every American citizen to think and speak free without fear.

Petitioners request that the Court decide the issues presented in the Petition for Extraordinary Writ/ Motion for Summary Judgment, pursuant to RAP 2.5(c)—Law of the Case Restricted– and amended RCW 4.24.510, which is the law in effect at the time of final judgment.

ISSUE ONE. Whether the qualified "good faith" immunity of Washington's "anti-Strategic Lawsuit against Public Participation (SLAPP)" statutes, RCW 4.24.500, .520 and former .510 are unconstitutional under the First and Fourteenth amendments.

A. *The plaintiffs' petitioning of government was immune from civil suits for damages since the 1991 U.S. Supreme Court's decision in City of Columbia v. Omni Outdoor Advertising,Inc; RCW 4.24.500-.520 was unconstitutional since 1991. The courts' failure to address the constitutional issues prolonged litigation ,"chilled" or violated petitioners' 1st and 14th Amendment constitutional rights.*

Washington's "anti-SLAPP" statute was unique when enacted in 1989 because the legislature's stated intention was

to provide extra protection from lawsuits for citizens' fundamental constitutional rights of petition and political speech. This is an extremely important distinction from the viewpoint of comparison with other qualified immunity statutes. The question that necessarily follows is---Why did the legislature enact the statute when citizens had an "inalienable" right to petition government bodies and officials under the Constitution? Because the threat of lawsuits for speaking at a town meeting has become a modern "threat" to future citizen participation. More important for this Court, Washington State's judiciary was the perceived threat.

Former RCW 4.24.510's subject matter was constitutionally protected speech---citizen speech addressing government matters to government bodies or officials, the usual definition of political speech. The subject matter is not speech between individual private persons about private concerns. The 1989 statute's stated "intent" of RCW 4.24.500 was to protect citizens' communication to government bodies from the "*threat*" of SLAPPs with the passage of RCW 4.24.500-520. However, because of "good faith", trial courts failed to dismiss a number of SLAPPs, including the present case, which resulted in prolonged litigation and "chilling" of the petitioners' and public's First Amendment rights ("[A]lthough Washington adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review." Am. .510

Former RCW 4.24.510 and the good faith immunity of RCW 4.24.500 and .520 provide the "appearance of" or "the color of" protecting citizens from civil suits. However, statutory qualified immunity is not content neutral when it expressly defines and regulates petitioning and speech as a class of expression based on content or subject matter. *Collier v. Tacoma*, 737 P.2d. 1046 (1993). The Washington Supreme Court's opinion upholding qualified immunity was unconstitutional in that it expressly defined and regulated petitioners' speech as a class of expression and encroached or

diminished citizen speech. As support for its decision in the present case, the Court cited *Gilman v. MacDonald*, 875 P.2d 697 (1994) and *New York Times v. Sullivan*, 376 U.S. 254 (1964) defamation standard ("[W]here a defendant in a defamation action claims immunity under RCW 4.24.510 on the ground his or her communications to a public officer were made in good faith, the burden is on the defamed party to show by clear and convincing evidence that defendants did not act in good faith.")

After three years of litigation, the Court determined, "Under the facts presented to the trial court, Right-Price failed to establish a prima facie case of defamation." Pet.App. 27. Federal common law determined in 1982 that the *New York Time's* 1964 definition of good faith immunity, in practice, failed to protect federal officials from lengthy, burdensome lawsuits in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, (1982). The U.S. Supreme Court recognized the problem of the subjective "good faith" or "malicious" intent standard in a statute providing government officials with qualified immunity—it frequently proved incompatible with the principle that insubstantial claims should not proceed to trial. *Id.* This Court revised the "good faith" standard to one of immunity from suit if officials' conduct "did not violate 'clearly established' statutory or constitutional rights which a reasonable person would have known." *Id.* at 815.

Although *Harlow* was not a First Amendment case, the constitutional right of petition was the subject of the U.S. Supreme Court's opinion of 1991. The Supreme Court articulated a simple, objective rule or test for immunizing petitioning activities under the petition clause in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). The U.S. Supreme Court, in a unanimous decision, ruled it irrelevant that a private party's political motives are "selfish" because the Petition Clause "shields a concerted effort to influence public officials, regardless of intent or purpose." *Id.* at 380. *See*, Pring, Envelope #1 at 27. Assuming citizens enjoy the same immunity from civil suit

as corporations in anti-trust cases, courts must dismiss SLAPPs whenever the target's petitioning seeks an outcome of government process (legislation, rulings or other government action or inaction). *Id*

A troubling pattern of Washington judicial decisions evolved over the past two decades---different immunity standards for citizens and public officials. While the courts consistently protect constitutional "property rights" and public officials' "reputation," Washington's protections did not extend to the average citizen, which presents a problem of equal protection for persons similarly situated. SLAPPs are state action because they are the private use of challenged state procedures with the help of state officials. Governments cannot silence critics without a filer, which could be either a government entity or a private person whose interests coincide with the government's interests. A filer can not sustain abuse of judicial process without judicial assistance.

The Groups challenged the constitutionality of the established state procedures and appellate case law that interpreted former RCW 4.24.510 in the Court of Appeals and the Washington State Supreme Court. Petitioners claimed statutory and constitutional immunity from suit since the 1999 answer and initial discovery. Since 1999, the trial courts and appellate courts rejected petitioners' arguments set forth in the U.S. Supreme Court's 1991 decision in *Omni v. City of Columbia,* which defined the Group's petitioning and speech before the County Council. After four years of litigation, no court has yet to address any presented constitutional issues. In the present case, the Court's opinion relied upon the constitutionally defective statute and never addressed the constitutional issues.

The Court erred. The Court's error wrongfully subjected the plaintiffs to the tumultuous proceedings and decisions of the past year. A review of the complex history of this case could reach but one conclusion--- the courts and private persons acted together to chill and deter the plaintiffs from exercising their First and Fourteenth Amendment rights. The

Court's opinion did not discuss or consider amended .510 and upheld former .510's defamation "actual malice" standard with conclusory statements,"[U]nder the *Gilman* test, which we approve..." and "[t]he test's requirements ensure that former RCW 4.24.510 does not unconstitutionally chill protected speech." Pet.App. at 27.

The Court did not examine the statute to ensure that the former statute did not "chill" First Amendment activities. Instead, it stated that, "Because we decide this appeal on statutory grounds, we do not reach the issues of constitutional or common law immunity." Pet.App. 25. The decision and its rationales are not "strict scrutiny."

Finally, a less restrictive alternative already exists when most government hearings or processes have an appeal process to the courts if a party is dissatisfied with a decision based upon citizen communication to government agencies. Allowing the courts to interpret or reinterpret statements before and to government bodies violates the separation of powers when the bodies have designated authority to decide public issues. Here, if RP's claims of harm were legitimate, the remedy was LUPA, especially when PCRCA was not the deciding authority.

The State adopted *Harlow's* objective standard in the 1980s for public officials' qualified immunity from civil suits. When the legislature enacted RCW 4.24.500-.520, the subject matter was First Amendment citizen communications to government about government matters. Because the subject matter was First Amendment communications, the legislature should have taken greater care to ensure that the statute would protect, rather than impair, the constitutional rights of Washington's citizens. The constitutionally defective state statute contradicted federal common law in *Omni.* The statute was clearly written and interpreted as obstacles to discourage dismissal while providing the "color of" protective immunity, which was also the reason for the lack of reference to the First Amendment in the statutory language. Because the statute does not treat people

situated equally, the statute also violates equal protection. The statute likewise fails to provide a remedy or procedural protections against abuse.

B. Amended RCW 4.24.510 is constitutional and should be the "law of the case."

After the Court granted review on October 30, 2001, the legislature considered statutory amendments to former RCW 4.24.510 on January 24, 2002, several days before oral argument. Pet.App. 106-136. On February 7, 2002, SHB 2699 initially included the *NY Times* and *Gilman's* "good faith" standard. Senate Bill Report included testimony for and against the original bill. Representative Patricia Lantz, prime sponsor of the original bill testified:

> *"SLAPP suits can involve an elected official who is not acting within the scope of his or her elected duties. There is no immunity for elected officials if there is a question about the elected official's role...The award of costs, reasonable attorney fees, and expenses can prevent voices from being silenced."* (emphasis added).

The House Digest and Final Bill Report acknowledged appellate court interpretation of "good faith" qualified immunity. The final legislative summary amended the "anti-SLAPP" statute "to remove the requirements that the communication be made in good faith and to cover communications to a branch of the federal, state, or local government.." *Id.* The final Bill included additional statutory remedies for persons who prevail on the defense. The statute awards damages of $10,000 against the SLAPP filer. *Id.* Amended .510's intent section provides:

> SLAPP suits are intended to intimidate the exercise

> of First Amendment rights*** the anti-SLAPP law has failed to set forth clear rules for early dismissal of these kinds of suits; and United States Supreme Court precedent has established that as long as government petitioning is aimed at having some effect on government decision-making, the petitioning is protected, regardless of intent or motive, and the case should be dismissed. *Id.*

Amended RCW 4.24.510 was effective June 13, 2002. Pet.App. 106-136. Although the legislature amended RCW 4.24.510, it did not repeal inconsistent RCW 4.24.500 and .520, which retained immunity only for "good faith" communications. The Court should strike sections .500 and .520 as unconstitutional because they impose barriers or unduly burden citizens' rights. Because amended RCW 4.24.510 was effective when the Washington Supreme Court issued the Mandate (June 13, 2002), amended .510 should be the "law of the case." Amended RCW 4.24.510 was also the law in effect at the time dismissed the case with prejudice on May 28, 2003. Because the case was appealed (July 2002 and March 2003) after remand, the Court should decide the issues presented under Rule of Appellate Procedure 2.5.

ISSUE TWO. Whether the State, with the enactment and judicial interpretation of RCW 4.24.500-.520, and the judiciary's joint participation with private individuals continued the SLAPP 'under color of law,' depriving the Groups of their 1st and 14th Amendment rights.

A*) Every proceeding, order or act was in the clear "absence of legal authority," or subject matter jurisdiction, because the Groups were immune from the filers' 1999 civil suit under the First Amendment and "clearly established law" of the U.S. Supreme Court 1991 decision in Omni.*

CHART A-SLAPPs: JUDICIAL REVIEW AND DEFENDANT REMEDIES

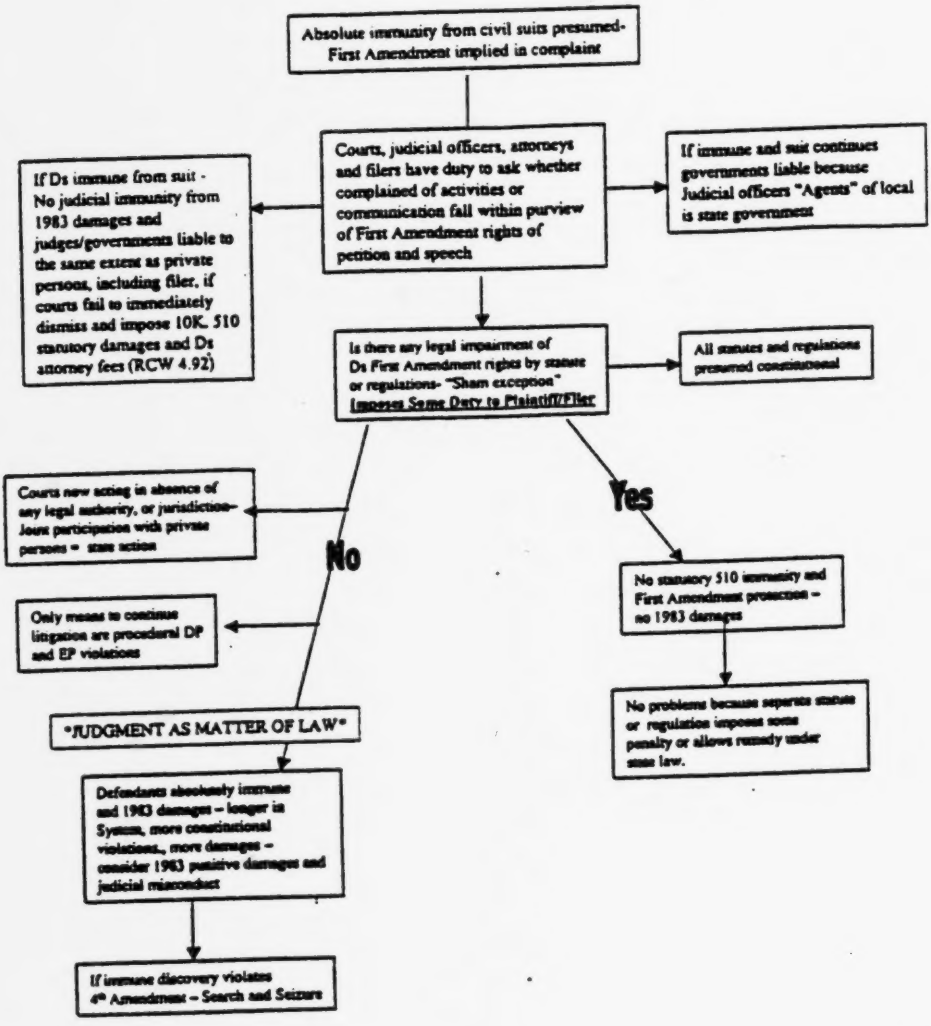

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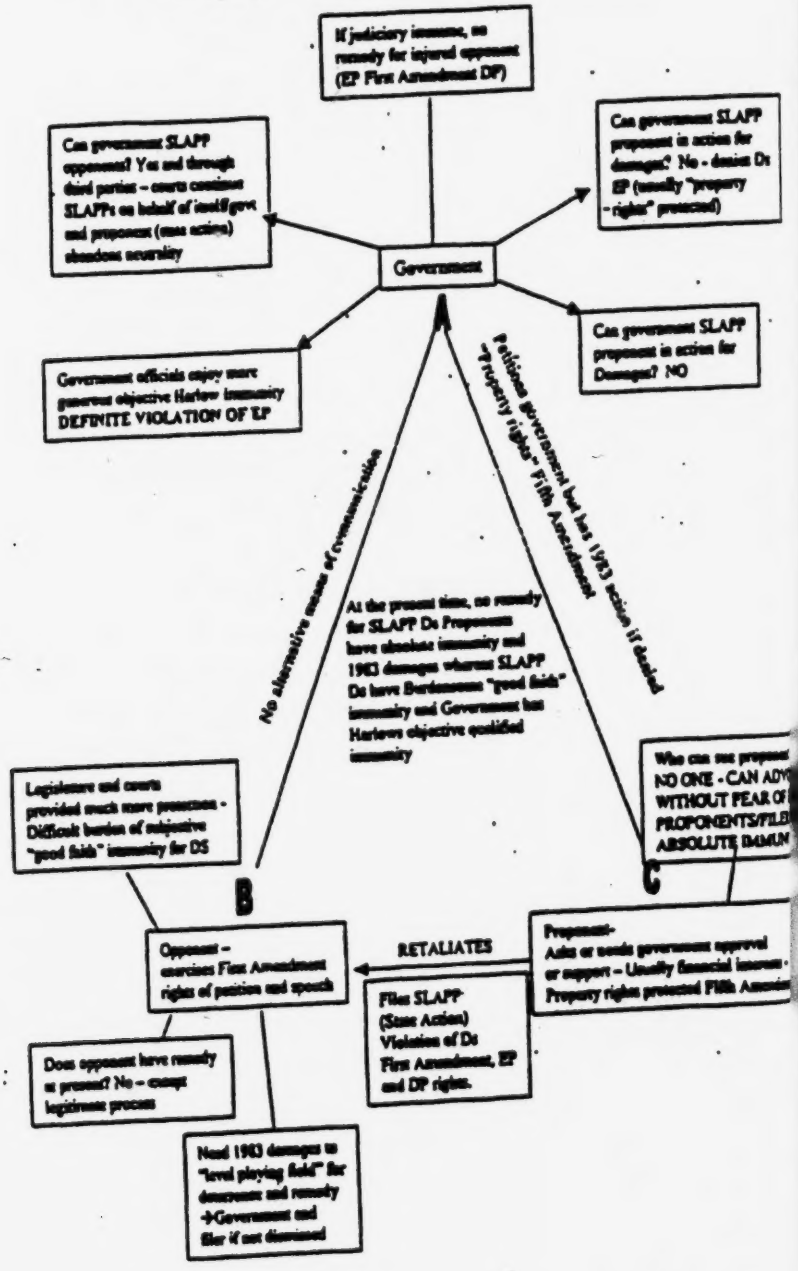
CHART B –
WHY SLAPPs VIOLATED GROUPS FIRST AMENDMENT RIGHTS AND EQUAL PROTECTION DUE PROCESS



Equity follows the law and cannot provide a remedy where legislation expressly denies it. *Williams v. Duke*, 215 P.2d 372 (1923). The courts were powerless to adjudicate the SLAPP over which it lacked subject matter jurisdiction. *Deaconess Hosp. v. Washington State Highway Comm'n*, 403 P.2d 54 (1965). "Subject matter" for purposes of resolving an issue of jurisdiction of the subject matter of a suit means the nature of the cause of action and the relief sought. *Silver Surprize, Inc. v. Sunshine Mining Co.*, 445 P.2d 334 (1968).

In accordance with the cited principles, the U.S. Supreme Court made the distinction between the excess of jurisdiction and the clear absence of all jurisdiction over the subject matter in 1871:

> Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority; when the want of jurisdiction is known to the judge, no excuse is permissable. *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967) (citing *Bradley v. Fisher*, (13 Wall.) 80 U.S. 335, 347, 351-352 (1871).

As stated in *Harlow*, immunity is immunity from suit, not merely a defense from liability. Because the Groups enjoyed immunity from civil suits for damages under former RCW 4.24.510 and *Omni*, the courts lacked subject matter jurisdiction and could only dismiss the case and award attorney fees. Every judicial order, decision and remand in this case was unlawful and committed "under color of law."

Right Price and Michael Mastro became liable for 1983 damages when the suit was filed in 1999 and the remaining defendants assumed joint liability when they continued the lawsuit, encouraged discovery or prevented dismissal. Because the plaintiffs were immune from suit, the Court should enter judgment as a matter of law.

B) *Defendants violated the Groups' First Amendment rights with the enactment and judicial interpretation of RCW 4.24.510 and when they filed or continued the SLAPP against the Groups*

Under the doctrine of "unconstitutional conditions," governments may not retaliate against a person for having engaged in conduct protected by the U.S. Constitution's First Amendment. *Crawford-El v. Britton*, 523 U.S. 574, 588, n.19, 592 (1988). The reason such retaliation offends the Constitution is that it threatens to inhibit the exercise of the protected right. *Pickering v. Bd. of Education*, 391 U.S. 563, 574 (1968). In 1999, Pierce County filed two lawsuits against person(s) or groups that criticized Pierce County government, which establishes Pierce County's official policy, enforced in the present case by Pierce County Superior Court Judge Van Doorninck. *See, "Pierce County Sues Activist Group/ Legal Action Stirs Debate About How Government Deals With Its Critics,"* News Tribune, January 31, 1999 by Lisa Kremer. Pet.App.108. The article contained the quotes as follows:

I think it's important to know there are limits that a citizen activist can reasonably pursue. Pierce County Executive Doug Sutherland

County officials ...say citizen groups should be careful when it comes to tangling with the County. Councilwoman Karen Biskey ...said she believed ***"some council members wanted to punish slow-growth groups."***

County Executive Sutherland assured some community groups that they would not be sued because "[T]hey have for the most part been within reason."

Later, Biskey said community groups are entering an expensive world when they take on the County.. '[T]he

County had to defend its position so they went on to do this lawsuit....I didn't want them to do that because I liked the decision. But it's not a harmless game. It's serious...***When you start messing with the legal system it can turn around and bite you in the back.'*** App 262-265.

Three months later Right Price filed its lawsuit. The Court of Appeals issued its opinion on April 20, 2001. On May 14, 2001, Newman wrote the following:

> Sweeney called me this morning wanting to explore settlement of the case. His proposal: we go away, he goes away. Unlike before when he conditioned his dismissal on the citizens agreement never to challenge another development by his client, he said he is not connecting the LUPA action or future actions of the groups. ***

In other words, Right Price/ Mastro filed the SLAPP in retaliation against the Groups for opposing the Pierce County project approval. On May 17, 2001, CPCC LUPA attorney, Michael Gendler, wrote the following to CPCC:

> A few minutes ago Sweeney called me to tell me he was withdrawing his motion for costs*** Sweeney told me he was interested in a global settlement, and even told me that we could put one together that would allow CPCC to appeal the LUPA ruling ***. A couple of settlement ideas***persuade the other defendants to not appeal. App 834.

These are examples of "unconstitutional conditions" referenced in *Crawford-El.* SLAPPs are equivalent to extortion, an illegitimate use of legal process—do not appeal and the plaintiff will dismiss the SLAPP or work out a global settlement that allows a LUPA appeal.

The Court of Appeals supported the use of SLAPPs against government critics when it refused to consider the constitutional issues and immunity. The Court of Appeals' remand to Pierce County Superior Court was a judicial affirmation of Pierce County's policies.

Pierce County Superior Court Judge Van Doorninck refused to dismiss the SLAPP because she was carrying out the policies of Pierce County government of silencing government critics. She communicated with the filers and attorneys Newman and Gendler to continue the SLAPP on remand and denied the Groups any remedy of the Supreme Court's decision, which was a valid order of dismissal of the SLAPP against the Groups and an award of attorney fees. How can the First Amendment survive under the above circumstances? It cannot, which is why the Court should grant the relief requested.

C) Former RCW 4.24.510,.500 and .520 deprived petitioners of their 14th Amendment rights of equal protection and due process.

The Fourteenth Amendment encompasses the related due process and equal protection clauses. The purpose of procedural due process rules is to protect persons, not from deprivation of life, liberty or property, but from the *mistaken* deprivation of life, liberty or property. *Matthews v. Eldridge*, 424 U.S. 319 (1976). Due process requires notice, the right to be heard, an impartial tribunal, a decision on the record and counsel in some cases. *Id*

The Equal Protection Clause of the 14th Amendment secures every person within the State's jurisdiction from intentional and arbitrary discrimination, whether by express terms of a statute or by its improper execution through duly constituted agents. *Sunday Lakes Iron. Co. v. Wakefield*, 247 U.S. 350, 352 (1918). Equal protection claims are not necessarily animus directed to the plaintiffs; specific allegations of intent are essential elements of certain

constitutional claims, such as an intent to disadvantage members of a certain class that included the plaintiff or to ***deter public comment on issues of public importance.*** *Crawford-El v. Britton*, 523 U.S. 574, 588, 592 (1988).

In 1989-1990, Washington State began developing a state-wide Growth Management Act (GMA), which relied on public or citizen participation to balance the special interests' influence in environmental and land use planning. The GMA's legislative purpose was to reduce urban sprawl and preserve the State's natural resources and environment.

Meanwhile, in 1989, the public's outrage over the "Brenda Hill" incident (addressed in the SLAPP section, *supra*, and Final Bill Report at App 101) induced the Governor and Attorney General to initiate legislation that would "protect citizens from the *threat of* civil suits for damages" for communications relating to a matter of public concern. *Id.* Although the U.S. Supreme Court in 1982 stated that the "good faith" qualified immunity failed to protect federal officials from lawsuits, Washington adopted the subjective "good faith" standard rather than *Harlow's* immunity from suit unless there is evidence of a violation of "clearly established law."

Environmental and land use issues are the most common subject matters of SLAPP litigation----the filer's personal property rights conflict with the community's first amendment rights of petition related to preservation or perceived degradation of the environment as a whole. SLAPPs are the perfect tool to eliminate public comments or questions, particularly if the proposal does not conform to the newly enacted GMA, as in the present case.

Issue Three. Whether the plaintiffs, as a matter of law, are entitled to compensatory and punitive damages and remedies, pursuant to 42 USC 1983 and amended RCW 4.24.510.

A. *Defendants, which include government entities and private parties, are liable for 42 U.S.C. § 1983 compensatory damages sustained by the Groups when the defendants filed and/ or continued the SLAPP.*

Although former/ amended RCW 4.24.510 guarantee(d) qualified or absolute immunity against SLAPPs for protected speech, the amended statute does not expressly provide a remedy when the filer and the courts fail to dismiss the SLAPP. (Amended .510 provides for statutory damages of $10,000 against a SLAPP plaintiff for filing a SLAPP; however, the statute is silent as to a remedy if the filer and courts continue the SLAPP).

Courts will imply a right of action from a legislative enactment that creates no remedy for the protection of specified classes of persons when three requirements are met: 1) The plaintiff falls within the class of persons for whom the statute was especially enacted to protect; 2) Legislative intent supports the creation of a remedy; and 3) The remedy is consistent with the underlying purpose of the legislation. *Bennett v. Hardy*, 784 P.2d 1258 (1990).[3] Former and amended RCW 4.24.510 implied a remedy under 42 USC § 1983. Acts "under color of law" of state or local government includes not only acts done by state officials within the bounds or limits of their authority, but also acts done without and beyond the bounds of their lawful authority. Black's Law Dictionary 6th Edition at 266. The purpose of 1983 is to "deter state actors from using their badge of authority to deprive individuals of federal guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158 (1992).

To prevail in a federal 1983 action, the Groups must show 1) Some person deprived the plaintiff of an established

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3 "The *Bennett* test was from the federal courts and is similar to 874A of the Restatement (Second) of Torts.

federal constitutional or statutory right, privilege or immunity; 2) The person must have been acting under color of state law; and 3) deprivation and post deprivation procedures were inadequate. *Parratt v. Taylor*, 474 U.S. 527(1981), overruled in part on other grounds in *Daniels v. Williams*, 474 U.S. 327 (1986); *Lutheran Day Care v. Snohomish County*, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079 (1993).

A § 1983 plaintiff must first demonstrate establishment of a clearly established constitutional right. A right is "clearly established" if the alleged conduct violated federal constitutional or statutory rights which were clearly defined by the law as it existed at the time of the occurrence. *See, Harlow v. Fitgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985). As applied to the present case, the Groups had a "clearly established right" of constitutional and statutory immunity from suit since 1999 under former RCW 4.24.510, *Omni* and *Harlow*.

The second requirement is establishing that the deprivation occurred "under color of law." If a party challenges established state procedures or a constitutionally defective state statute that results in the deprivation of a plaintiff's constitutional rights, the plaintiff presents a valid cause of action under 1983. *Lugar v. Edmondson Oil Co.*, 45 U.S. 922, 937 (1982) (where respondent sought prejudgment attachment of petitioner's property in ex parte proceeding authorized under state law). In *Lugar* and the present case, private persons initiated legal proceedings.

The legal question in *Lugar* was whether 1983 applied in proceedings between private parties rather than between government and private persons (state action requirement). The U.S. Supreme Court in *Lugar* and similar cases established private persons jointly participating with government officials sufficiently met the state action requirement of the 14th Amendment. *See, Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) ("It is enough that [a private person] is a willful participant in joint action with the state or

its agents" and "Private persons, jointly engaged with state officials in the challenged activity, are acting 'under color of law' for purposes of 1983"). The Groups challenged state procedures and the former constitutionally defective anti-SLAPP statute in the Washington State Court of Appeals and the Washington Supreme Court.

The Groups meet the third 1983 requirement if they demonstrate that deprivation or post deprivation procedures were inadequate. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. *Zinerman v. Burch*, 494 U.S. 113 (1990). This inquiry would examine the procedural safeguards built into the statutory procedures of effecting the deprivation and any remedies for erroneous deprivation provided by statute or tort law. *Id.* Because the courts failed to address the constitutional issues, the "procedural safeguards" failed, depriving the Groups of their rights to be free from the SLAPP.

While private SLAPP filers are clearly liable for compensatory and punitive damages in filing a SLAPP, the extent of government SLAPP liability in Washington, including judicial immunity, remains to be determined. The Eleventh Amendment traditionally protected States, but not local governments, from federal remedial statutes, such as 1983. *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). *Monell* answered the question of whether "any person" in the language § 1983 covered more than natural persons. The *Monell* Court recounted that, by 1871, municipalities, like private corporations, were treated as natural persons for virtually all purposes of constitutional and statutory analysis. *Id.* at 687-688. In particular, local governments were routinely sued in both federal and state courts and it was understood that a municipality's tort liability in damages was identical to that of private corporations and individuals. By imposing specific duties on municipalities, the State impliedly withdrew the city's

immunity from liability for the nonperformance or misperformance of its obligation. *Id.*

The principle of sovereign immunity and the Eleventh Amendment insulated States from *unconsented* federal 1983 suits. However, the U.S. Supreme Court in *Alabama v. Pugh*, 438 U.S. 781, 783 (1978), held *a State could be a defendant under § 1983 if it consented to suit.* The doctrine of sovereign immunity has evolved over the past few decades as states, by statute or common law, have abrogated sovereign immunity by statute or by implication i.e. by imposing specific duties on the State. *See, Babcock v. State*, 809 P.2d 143 (1991)(where State did not enjoy immunity for negligent investigation of its caseworkers because State does not enjoy the immunity of its employees).

Washington's legislature abrogated sovereign immunity in the 1960s with the enactment of RCW 4.92. 090, which provides:

> The State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

The provision operates to make the State presumptively liable in all instances in which the legislature has not indicated otherwise. *Savage v. State*, 899 P.2d 1270 (1995). RCW 4.96.010 is the identical local government counterpart to RCW 4.92.090. Therefore, the State and Pierce County do not share the immunity of its agents for compensatory damages under 1983 if the Court determines that individual judicial officers are immune from SLAPP counterclaims. (*See*, discussion of abolition of Washington's sovereign immunity in *Savage v. State*, 899 P.2d 1270 (1995)).

Moreover, a public officer's individual immunity cannot be imputed to the officer's employing governmental agency in an official capacity lawsuit. *Brandon v. Holt*, 469 U.S. 464 (1985); *Accord, Lutheran Day Care v. Snohomish Cy.*,

829 P.2d 746 (1992), *cert. denied,* 506 U.S. 1079 (1993) (citing *Pembaur v. Cincinnati,* 475 U.S. 469, 478-480 (1986) (policy requirement not only concerned with cause in fact but also with duty). An individual official in a personal capacity suit may be able to assert personal immunity defenses. However, personal immunity defenses are unavailable in an official capacity action and those seeking to recover in an official capacity suit must look to the government itself. *Id.*

Before petitioners have a cause of action in an official capacity suit, they must establish that a government agent causing the injury acted under color of a policy, custom or usage for purposes of 1983. *Id.* A governmental agency "causes" a constitutional deprivation for purposes of the agency's liability if an act by an officer of that agency constitutes the agency's official policy. *Id.* "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority." *Pembaur v. Cincinnati* at 483. Governmental liability is usually limited to compensatory damages, whereas private individuals or corporations are liable for compensatory and punitive damages. However, because of the nature and circumstances of this case, the plaintiffs are requesting substantial § 1983 compensatory and punitive damages.

Damages must be substantial if 1983 is to fulfill its remedial and deterrence purposes. Governments and filers oftentimes have greater financial resources, whereas SLAPP defendants suffer personally over years, such as four years in the present case. Attached Chart B exhibits why the Court should "level the playing field" with substantial damages under amended .510 if the statute is to fulfill its purpose of protecting against SLAPPs, while providing a remedy if safeguards fail and why qualified immunity violated the 14th Amendment's rights of equal protection and due process.

As stated in *El-Britton* and *Lugar,* defendants are ultimately liable if petitioners challenged the statute as constitutionally defective. The defendants continued their conduct despite the arguments presented in the constitutional

constitutionally defective. The defendants continued their conduct despite the arguments presented in the constitutional challenge. § 1983 damages meets *Bennett v. Hardy's* requirements that support implication of a federal remedy when RCW 4.24.510 is silent as to the remedy if immunity fails to protect SLAPP defendants. The Court's opinion of May 16, 2002 determined the Groups were within the class of persons for whom the statute was enacted to protect.

Legislative intent supports the creation of a remedy. The Legislative Digest of HB 2699-S states, ["A]lthough Washington adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review." App 99.

The legislature amended RCW 4.24.510 because the courts failed to dismiss SLAPPs, such as 71099-6. App 101. The Final Bill Report also states that "SLAPPs are intended to intimidate the exercise of First Amendment rights." The legislature added statutory damages when it amended RCW 4.24.510 and added "branch" of government, which was consistent with the Court's holding in 1994 of *Lutheran Day Care* that "agency" includes branches of government, such as the judicial branch. The legislature's amendment supports § 1983 damages because it references the First Amendment, making the failure to dismiss a constitutional tort. The legislature's citation to *Omni* and the First Amendment implies a federal remedy and the addition of "branch" implies judicial proceedings. The legislature's imposition of strict liability and statutory damages of $10,000 against a SLAPP filer also supports additional remedies.

Creation of a 1983 cause of action meets *Bennett's* third requirement— the remedy is consistent with the underlying purpose of the legislation. Former .510 failed to provide early dismissal review—the deterrence of 1983 compensatory and punitive damages for egregious conduct are the only means ensuring SLAPP dismissals. Compensatory damages may also be inadequate because the damages inflicted by SLAPPs are not always quantifiable.

Post deprivation remedies were inadequate. Attachment A to the summary judgment motion filed in the Washington Supreme Court also provides convincing evidence respondents were carrying out official policies referenced in *Monell.* The legislative enactment of 1989, subsequent judicial interpretations that applied different standards of immunity, and the specific decisions in this case, established policy at the State level. The Supreme Court is the State's "final decision maker" and the Court's decisions support punitive damages. Judge Kitty Ann Van Doorninck was the final decision- maker at the County level. The Council's history of Pierce County's filing SLAPPs against citizens referenced in the newspaper article of 1999, together with the trial court's egregious, if not criminal, conduct suffices to establish Pierce County policies of silencing government critics.

B. The Court should impose punitive damages against respondents in the present case when the defendants, with intent, malice, and "under color of law," deprived the Groups of their constitutional rights of immunity from the SLAPP

While it is well settled that private persons and corporations are liable for 1983 punitive and compensatory damages, punitive damages against government entities remains in a flux of revision. However, absolute immunity of government from punitive damages and the absolute immunity of judicial officers are interrelated. Citations in both issues may be applicable. This is an "official capacity" lawsuit, or one where the named defendants are sued only in their official capacities as government representatives.

The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired. *Sullivan v. Little Hunting Park,* 396 U.S. 229 (1969). Whereas compensatory damages are mandatory for violations of constitutional

rights, *Smith v. Wade*, 461 U.S. 30 (1983), punitive damages are not intended to compensate the injured party. The purpose of punitive damages is to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct. Restatement (Second) of Torts 908 (1979).

The U.S. Supreme Court in *Carey v. Piphus*, 435 U.S. 247, 257, n. 11 (1978), indicated that punitive damages might be awarded in appropriate circumstances in order to punish violations of constitutional rights. The Court may consider and assess punitive damages in a 1983 action when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. *Smith v. Wade*, 461 U.S. 30 (1983). Courts hesitate to award punitive damages against government because it "punishes" taxpayers who took no part in the commission of the tort. *Owen v. Independence*, 445 U.S. 622, *re'hg denied*, 446 U.S. 993 (1980). *Owen* relied on the state of the law at the time of enactment of § 1983 by Congress in 1871, where is was understood that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity. However, municipal liability did not extend to the award of punitive damages. *Id. See*, *Newport v. Fact Concerts*, 453 U.S. 247 (1981) (municipalities absolutely immune from punitive damages).

The U.S. Supreme Court's 1981 *Newport v. Fact Concerts* decision preceded the Court's 1983 decisions in *Smith v. Wade* (punitive damages against state officer) and the Court's 1985 decision in *Brandon v. Holt*, 469 U.S. 464 (1985). *Newport* also preceded Washington's 1992 decisions in *Lutheran Day Care* and *Babcock*, which established the County and State do not enjoy the immunity of their agents (judicial officers) for compensatory 1983 damages. *Lutheran Day Care v. Snohomish Cy.* 119 Wn.2d 91 (1992)

In *Lutheran Day Care*, the issue was whether the County enjoyed immunity from suit for the acts of its

absolutely immune quasi-judicial officer. While this issue concerns punitive damages against government (judicial immunity addressed below), the Court should apply the same analysis in determining whether Washington's state and local governments are liable for punitive damages for SLAPPs against citizens under § 1983. *Lutheran Day Care* admonished against conclusory holdings which rely on ostensibly controlling cases when a "detailed policy-oriented factual inquiry which *** is necessary to decide the immunity question." *Lutheran Day Care*, 829 P.2d at 755.

Because 1983 is a federal remedy for violation of federal rights granted by a state statute, RCW 4.24.500-.510, the starting point of analysis should be the statutes abrogating State and local government immunity. 42 U.S.C. § 1983 provides a cause of action against private persons, such as Mastro and Right Price, for punitive damages in an egregious case for intentional violation of constitutional rights. The Supreme Court's decisions consistently established that private persons or corporations are subject to punitive damage liability. If private persons are possibly liable in the present case for punitive damages under § 1983 and, if the State and County are liable *to the same extent as a private person*, Washington State and Pierce County are presumptively liable for punitive damages to the same extent as Right Price and Mastro.

The *Lutheran Day Care* Court cautioned against strict reliance on conclusory citation of authority to determine the extent of immunity. Conclusory citation increases the risk of finding immunity based on function (judge, prosecutor), rather than the policy implications of absolute immunity. The mere fact that the analysis might change the existing state of the law is no reason to interpret it so it does not when the legislature's purpose in enacting most laws is to remedy perceived defects in the common law. *Id.*

The *Lutheran* Court set down future guidelines for determining whether entities or persons are entitled to the protections of absolute immunity. "Absolute immunity

necessarily leaves wronged claimants without a remedy" and the Court would start from the proposition that there is no such immunity in determining whether a particular act entitles the actor to absolute immunity. *Id.* (citing *Butz v. Economou*, 438 U.S. 478, 506 (1978)). Only when the person claiming such absolute immunity can prove such immunity is justified will the Court impose it. *Id.* The *Lutheran Day Care* Court held, in order for government officials to make the showing justifying absolute immunity, they must establish three things. First, the official must show that he performs a function analogous to that performed by persons entitled to absolute immunity, such as judges.

Second, the official must show how the policy reasons that justify absolute immunity for the judge justifies absolute immunity for that official. Third, the official must show that sufficient safeguards exist to mitigate the harshness to the claimant of an absolute of an absolute immunity rule (*citing Butz v. Economou* at 512-513). State and County officers definitely perform functions comparable to judges and legislators---situations where adequate safeguards exist to protect against errors are detailed in *Taggart v. State*, 822 P.2d 243 (1992).

The second element concerned policy because absolute immunity for judges was thought necessary for the very survival of any independent, dispute-resolving system. Absolute immunity prevents injustice to officials whose position requires them to exercise discretion and the paralysis that might otherwise result if officials were constantly preoccupied with liability-creating potential of their acts. Absolute immunity alleviates the fear that, because of the potential of personal liability, no one will hold public office. Immunity avoids the possibility of a conflict of interest where a judge could be sued for a decision by the party of one side of a controversy and protects the conscientious judge who is most at risk without immunity.

The third element of the *Butz* test relates to the procedural safeguards that help to insure the correctness of officials'

decisions that reduces the need for a damages action. They are 1) the insulation of the judge from political influences; 2) the importance of precedent in solving controversies; 3) the adversary nature of the process; and 4) the correctability of error on appeal (*Lutheran Day Care*, citing *Butz* at 512).

Although the argument addresses governmental absolute immunity from punitive damages, in the context of SLAPPs, judicial and governmental immunity are the same and the arguments are identical. In amending RCW 4.24.510, the legislature changed the purely prospective language of former .510 from "shall be" to "is," which should be interpreted to mean that the legislature intended application to SLAPPs currently in litigation. App 90. This case was interlocutory, rather than appeal of a final judgment.

SHB 2699 originally contained the Court's definition of qualified immunity of *Gilman* and *New York Times*. The bill's sponsors, including prime sponsor Representative Patricia Lantz, originally testified for the qualified immunity. She argued that there is no immunity for elected officials if there is a question about their role before the Judiciary Committee on Februrary 25-26, 2002. App 107. The House eliminated good faith immunity and amended .510; it unanimously passed both houses in March 2002.

If there is a question about the elected official's role, it should follow that there is no immunity for the State or the County in this case for the acts of judicial officers or for punitive damages. Finally, if private persons are liable for punitive damages, and governments are liable to the same extent as private persons, as provided in RCW 4.92.010 and .090, government should be liable for punitive damages.

We believe that the Court should hold that represented governments of judicial officers who fail to dismiss SLAPPs should be liable for § 1983 compensatory and punitive damages in the proper SLAPP case.

C. Common law judicial immunity does not protect judicial officers and represented governments from 1983 claims for

damages if the courts fail to dismiss a SLAPP against citizens predicated on protected First Amendment activities.

Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority; when the want of jurisdiction is known to the judge, no excuse is permissable. *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967) (citing *Bradley v. Fisher*, (13 Wall.) 80 U.S. 335, 347, 351-352 (1871). The *Lutheran Day Care* Court noted in referencing an earlier decision in *Burgess v. Towne*, 538 P.2d 559 (1975), that the inquiry must be whether a judge acted in "clear absence of all jurisdiction," not whether the judge acted in excess of jurisdiction. Judicial officers and government entities are not subject to possible liability unless the courts and government entities act without the color of authority. *Id.* Therefore, state courts that fail to dismiss a SLAPP, despite anti-SLAPP statutory immunity, are liable if they act without the color of authority.

D. The Supreme Court should determine damages in the present case and impose CR 11 sanctions against the attorneys.

While the issue of damages is ordinarily one for the jury, the petitioners waive their right to a jury trial. [CPCC and PCRCA Waivers of Jury Attached]. Petitioners request that the Court exercise its constitutional and statutory authority and determine the proper proceedings to carry out the intent of the legislature that best "conforms to the spirit of the law" because justice so requires. Moreover, 42 USC § 1983 authorizes "any proper proceeding" for redress.

The petitioners agree for several reasons to waive their rights to jury determination. First, immunity is a matter of law; a jury trial is unnecessary when the tort takes place on the record. The Groups also do not believe they can obtain a fair hearing in the lower courts; given the facts of this case. The SLAPP has deeply affected everyone and petitioners prefer resolution without additional proceedings.

The Ninth Circuit, in *City of Monterey v.Del Monte Dunes at Monterey*, 95 F.3d 1422, stated that the U.S. Supreme Court distinguished rights of jury trial from cases where a defendant brings a broad challenge to the constitutionality of a statute. The Supreme Court, in dicta, noted that in such a context, the determination whether statutory purposes were legitimate, or whether the purpose, though legitimate, were furthered by the law or policy, may well fall within the province of the judge. We believe the principles apply here and request that the Court determine damages, as well as CR 11 sanctions against attorneys Newman, Gendler and Sweeney. CR 11 sanctions are the proper means of disciplining the attorneys; their conduct is detailed extensively in Attachment A.

The attorneys betrayed their oath, clients, harmed attorney Gain and the Groups immeasurably and then attempted to collect for their services. They intentionally prejudiced proceedings and petitioners and displayed a blatant disrespect for the Court and their profession. We do not request damages from the attorneys but request the Court impose *onerous* CR 11 sanctions be paid to the Court, which should transfer the funds to a WSBA-approved nonprofit group(s) as restitution for harms committed.

Dated October 30, 2003

Respectfully,

Sharon L. Gain, Petitioner
and Attorney, WSBA 27972

William Wright, Petitioner
and President of PCRCA

Jonathan Salisbury, Petitioner
and President of CPCC

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A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

RIGHT-PRICE RECREATION, LLC, a Washington Limited Liability Company,

No. 25713-1-II

Respondent,

v.

CONNELLS PRAIRIE COMMUNITY COUNCIL, a Washington non-profit corporation; PIERCE COUNTY RURAL CITIZENS ASSOCIATION, a Washington non-profit corporation; JON SALISBURY and JANE DOE SALISBURY, husband and wife; WILLIAM WRIGHT and JANE DOE WRIGHT, husband and wife; JOHN DOES 1 – 10 and JANE DOES 1 – 10,

PUBLISHED OPINION

Appellants

Filed: Apr 20 2001

ARMSTRONG, C.J. – Two citizens' groups opposed a developer's proposal before Pierce County's hearing examiner and county council. The developer, alleging that the groups had made false statements about the

proposal, sued for damages for slander, commercial disparagement, tortuous interference, and civil conspiracy. When the developer sought discovery of all documents related to the citizens' groups, the groups claimed an associational privilege under the First Amendment. The developer moved to compel production, and the trial court ordered production for in camera review. In this discretionary review of the discovery order, we hold that there is some probability that the requested discovery will harm the groups' First Amendment rights and that the developer has not shown the materiality of the information or that the information could not be otherwise obtained with reasonable efforts. We reverse the discovery order.

FACTS

Connell's Prairie Community Council (CPCC) and Pierce County Rural Citizens' Association (PCRCA) are citizens' groups (collectively, "the citizens' groups") that opposed two residential subdivisions in unincorporated Pierce County proposed by Right-Price Recreation LLC. After the citizens' groups stated their opposition to Right-Price's proposed developments before the Pierce County Hearing Examiner and the Pierce County Council, Right-Price sued the two groups and their members. The complaint alleged slander, commercial disparagement, tortuous interference, and civil conspiracy. The trial court denied the citizens' groups' motion to dismiss. The groups then moved for summary judgment.

Right-Price sought discovery from both groups of all (1) past newsletters, bulletins, press releases or editorials, (2) past bank statements, financial statements, tax returns, and any other financial documentation, (3) membership lists, rosters, or mailing lists, (4) minutes of all meetings held, (5) correspondence sent by the

citizens' groups. Right-Price also sought discovery, from CPCC only, of all (1) petitions and form letters CPCC circulated, (2) correspondence CPCC sent its officers, directors, and agents to other non-profit organizations, and (3) documents stored in any magnetic format generated by CPCC, its officers, directos, and agents.

The citizens' groups objected to these discovery requests, and Right-Price moved to compel production of the documents and information. The trial court ordered the citizens' groups to produce all of the requested documents and information to the court for in camera review. The trial judge concluded that this was necessary because she knew what Right-Price was looking for and needed to find out whether it was available:

> [I]t's an unusual case, and I would not normally say I want to review everything in camera, but I feel that's the only recourse I have because . . . I know what [Right-Price is] looking for. I don't know that [Right Price is] going to find it in anything that [the citizens' groups] provide, but I think [Right-Price is] entitled to it. There's some kind of smoking gun there[.]

RP at 7. The court recognized that some of the information would be privileged, but it declined to define what would be privileged. The court also granted Right-Price's motion to continue the hearing on the citizens' groups summary judgment motion. The citizens' groups obtained an emergency stay of the trial court's order from the Washington Supreme Court, and

we granted discretionary review of the interlocutory discovery order.

ANALYSIS

The citizens' groups characterize this lawsuit as a "Strategic Lawsuit Against Public Participation" (SLAPP). A SLAPP is a lawsuit brought in retaliation against a party who has opposed the plaintiff's interests before a government agency. *See* GEORGE PRING & PENELOPE CANAN, SLAPPs: GETTING SUED FOR SPEAKING OUT 8 (1996). To help prevent such lawsuits, the legislature granted immunity from civil liability to parties who, in good faith, communicate a complaint to a government agency. RCW 4.24.510. The citizens' groups contend that Right-Price sued their groups and members to chill the exercise of their First Amendment rights. In addition to challenging the trial court's discovery order, the citizens' groups raise issues not designated in the notice for discretionary review, contending that the trial court has failed to recognize Right-Price's lawsuit as a SLAPP.

I. Issues Not Designated in Notice for Discretionary Review

Although we granted discretionary review solely on the discovery issue, the citizens' groups ask us to review whether the trial court erred by denying their motion to dismiss and by granting Right-Price's motion to continue the citizens' groups' summary judgment motion. The groups also ask this court to hold the good faith requirement of RCW 4.24.510 unconstitutional. The citizens' groups urge us to review these issues under RAP 2.4(b), RAP 2.2(a)(3), and RAP 2.5(a).

Under RAP 2.4(b), an appellate court will review an order or ruling "not designated in the notice. including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review." The "decision designated in the notice" is the order requiring CPCC to submit the requested documents for in camera review.

RAP 2.4(b) permits review of prior appealable orders "to avoid the problem of precluding review of an order which is not readily identifiable as appealable." *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 135, 750 P.2d 1257 (1988). In *Adkins*, the Supreme Court held that a ruling granting a motion for a mistrial prejudicially affected the final judgment in the second trial because otherwise the second trial would not have occurred. *Adkins*, 110 Wn.2d at 134; *see also Hwang v. McMahill*, 103 Wn. App. 945, 949, 15 P.3d 172 (2000) (order denying a motion for revision prejudicially affected a later default judgment); *Behavioral Scis. Inst. V. Great-West Life*, 84 Wn. App. 863, 869-70, 930 P.2d 933 (1997) (prior orders prejudicially affected the trial court's final order because the plaintiff's entitlement to relief under the final order was based on the court's earlier rulings). But the Supreme Court construed "prejudicially affected" in a more limited way in *Franz v. Lance*, 119 Wn.2d 780, 836 P.2d 832 (1992). There, the defendants appealed an order imposing sanctions under CR 11 and RCW 4.84.185. *Franz*, 119 Wn.2d at 782. The court held that the notice of appeal included the underlying judgment even though it was not included in the notice. *Franz*, 119 Wn.2d at 782. The court reasoned that the sanctions issue "must stand or fall based on the findings and conclusions . . . in support of the*** judgment." *Franz*, 119 Wn.2d at 782. Thus, under *Franz*, the previous order prejudicially affects the

order designated in the notice of appeal if the order appealed cannot be decided without considering the merits of the previous order. This requires some connection between the two other than that the appealed order would not have occurred if the earlier order had been decided differently. The issues in the two orders must be so entwined that to resolve the order appealed, the court must consider the order not appealed.

The citizens' groups ask us to review the trial court's order denying dismissal. The groups moved to dismiss under RCW 4.24.500, the Anti-SLAPP statute. The court treated the motion as one for judgment on the pleadings under CR 12(b)(6). If the court had granted the motion, the case would have ended. Thus, as *Adkins* applied the "prejudicially affected" test, the denial of the motion would be reviewable. But, for two significant reasons, we apply the more limited interpretation of "prejudicially affected" used in *Franz*.

First, *Adkins* was a direct appeal, not a discretionary, interlocutory appeal. In a direct appeal, if "prejudicially affected" is not construed broadly, the issue omitted from the notice will never be addressed. But in a discretionary review case, the parties still have the right to appeal a final judgment and include for review the trial court's interim rulings and orders, even appealable orders. *See* RAP 2.4(b); *Kreidler*, 111 Wn.2d at 836. thus, a party who seeks discretionary review does not risk losing an issue not named in the notice. Second, if discretionary review includes all rulings that would have terminated the case even though not included in the notice, the scope of discretionary review would be greatly expanded. But discretionary review is not favored because it lends itself to piecemeal, multiple appeals. *State v. State Credit Ass'n, Inc.*, 33 Wn. App. 617, 622, 657 P.2d 327 (1983). For this reason, we grant discretionary review only in limited circumstances.

See RAP 2.3(b).[1] If discretionary review included all of the trial court's decisions that could have terminated the action, we could not limit the scope of review as required by RAP 2.3.

The citizens' groups also urge us to review the trial court's order continuing their summary judgment motion under RAP 2.2(a)(3). The rule provides that a party may appeal from "[a]ny written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action." RAP 2.2(a)(3). The continuance in this case fails to meet the requirements of this rule. The trial judge continued the summary judgment until we resolve the discovery issue raised in this discretionary review. The continuance did not determine the action, prevent a final judgment, or discontinue the action.

The citizens' groups also argue that it can raise these issues for the first time on appeal because they involve manifest errors affecting constitutional rights. *See* RAP 2.5(a). But this argument confuses the issues.

---

[1] Under RAP 2.3(b), we accept discretionary review only

(1) If the superior court has committed an obvious error which would render further proceedings useless;

(2) If the superior court has committed probable error and the decisionof the superior court substantially alters the status quo or substantially limits the freedom of a party to act; or

(3) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.

In a direct appeal, we may consider constitutional issues not raised before the trial court. But this is not a direct appeal; we granted discretionary review of the interlocutory discovery order only. And the issues now raised are issues the trial court considered. The citizens' groups seek to expand the scope of discretionary review by including issues that were raised in the trial court but not included in the petition for discretionary review. The Supreme Court did not intend RAP 2.5(a)'s constitutional error doctrine to apply in this way.

The citizens' groups attempt to use the discretionary review process to avoid further trial court proceedings. Although obvious or probable error by the trial court may warrant discretionary review under RAP 2.3(b) and RAP 5.1(c), we do not favor interlocutory review. *Pac. Rock Envtl. Ehancement Group v. Clark County*, 92 Wn. App. 777, 782 n.2, 964 P.2d 1211 (1998). We will not review the trial court's orders preceding the discovery order for which we granted discretionary review.

II. In Camera Review Order

The citizens' groups argue that the trial court erred by requiring production for in camera review the documents Right-Price requested. To assert the associational privilege under the First Amendment, a party resisting disclosure of information need only show some probability that the requested disclosure will infringe upon its First Amendment rights. *Snedigar v. Hoddersen*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990). The burden then shifts to the party seeking discovery to show (1) the relevance and materiality of the information sought and (2) that reasonable efforts to obtain the information by other means have been unsuccessful. *Snedigar*, 114 Wn.2d at 164.

To establish relevance, the party seeking discovery must specifically describe the information sought and its importance: "[m]ere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity." *Snedigar*, 114 Wn.2d at 165 (quoting *Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981), *vacated by* 458 U.S. 1118 (1982)). To meet the second requirement, the party seeking discovery must make a "reasonably explicit" showing that every reasonable alternative source of information has been exhausted before the court will order disclosure. *Snedigar*, 114 Wn.2d at 165.

If both parties make the required showings, the court then balances the need for disclosure against the claim of privilege to determine which is more compelling. *Snedigar*, 114 Wn.2d at 166. When "*clearly* necessary" to make this decision, the trial court may undertake in camera review of the requested information. *Snedigar*, 114 Wn.2d at 166. But "in camera review of associational materials is *not* a course to be routinely undertaken in a First Amendment case[.]" *Snedigar*, 114 Wn.2d at 167. Rather, in camera review "is justifiable *only* if essential to fairly evaluate the competing interests at stake." *Snedigar*, 114 Wn.2d at 167.

Right-Price argues that the citizens' groups have not met their initial burden of showing some probability that the requested disclosure will infringe upon their First Amendment rights. In *Snedigar*, the court held that the Freedom Socialist Party (FSP) had shown some probability that disclosure of its meeting minutes would harm its First Amendment rights. The party and other organizations submitted affidavits stating that members had experienced acts of reprisal and harassment and emphasizing the importance of confidentiality of

members' names and the content of internal discussions. *Snedigar*, 114 Wn.2d at 163-64. In contrast, the court held that an organization failed to satisfy its burden in *Rhinehart v. Seattle Times Co.*, 59 Wn. App. 332, 798 P.2d 1155 (1990). The Seattle Times requested discovery of information from an organization, including membership lists and donation records. Under the principles announced in *Snedigar*, the court held that the organization could not invoke the associational privilege because it had failed to present evidence showing some probability that discovery would harm its constitutional rights, especially in light of a protective order that limited use of the documents to the litigation. *Rhinehart*, 59 Wn. App. At 337-38.

The citizens' groups argue that the lawsuit "speaks for itself" and ask us to "take judicial notice that the average citizen experiences extreme alarm . . . when [a citizen] group or an individual of that group is named as a party in a lawsuit for unspecified damages." Reply Br. Of Petitioners at 13, 15. Although the citizens' groups have presented no specific evidence that the discovery request probably infringes upon their First Amendment rights, their situation is similar to the FSP in *Snedigar*. There, the plaintiff sought members' names and minutes of meetings. Thus, the members of the citizens' groups may share the same concerns of reprisal and harassment as the FSP in *Snedigar*. Further, Right-Price named individual members of the groups as actual and potential parties to its lawsuit; this also supports the citizens' groups' argument. But to conclude that the citizens' groups have met their burden, we would have to assume that disclosure will probably chill the citizens' groups' exercise of their First Amendment rights.

Some courts have assumed a harmful chilling effect from the nature of the information requested. *See Snedigar*, 114 Wn.2d at 162-63. Thus, courts "have overlooked the absence of a factual record of past

harassment and, using what can perhaps best be referred to as a commonsense approach, have assumed that disclosure of information will chill an association's First Amendment rights." *Snedigar*, 114 Wn.2d at 162. Rather than requiring concrete evidence, these courts view a factual showing of an actual chilling effect as simply one factor that weighs against disclosure. *Snedigar*, 114 Wn.2d at 162-63. Accordingly, a presumed chilling effect may outweigh a weak argument in support of disclosure. *See Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807, 812 (D.D.C. 1982).

The *Snedigar* court cites four cases recognizing a potential chilling effect absent concrete evidence. *Snedigar*, 114 Wn.2d at 162-63. In one case, the court found that some chilling effect would be inevitable if a longshoremen's political action had to disclose the names of its contributors. *Local 1814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267, 272 (2nd Cir. 1981). In another case, although the Arkansas Republican Party had submitted no evidence of past reprisals against contributors, the court held that it would be "naïve" not to recognize that disclosing contributors' names would subject some contributors to reprisal, especially in light of the party's unpopularity at the time. *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968). In a third case, the United States Supreme Court noted the obvious tendency to restrict freedom of expression of an ordinance requiring names and addresses on all distributed handbills. *Talley v. California*, 362 U.S. 60, 64, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960).

We conclude that the discovery order here fits within the class of cases where we can assume a potential chilling effect on the groups' First Amendment rights. Of particular concern is the scope of the discovery request. Right-Price asks for membership lists, minutes

of meetings, and all financial records. In addition, Right-Price seeks virtually every document or piece of correspondence the groups generated. As in *Pollard*, we would be naïve not to recognize that disclosure of this information would chill the members' First Amendment rights. When advocacy groups are required to disclose the identity of their members and the details of all of their activities, the freedom of members to promote their views suffers. Privacy and anonymity are often essential to the free exercise of First Amendment rights. *See Talley*, 362 U.S. at 64-65.

We turn then to the second step and consider whether Right-Price has shown (1) the relevance and materiality of the information it seeks and (2) that reasonable efforts to obtain the information by other means have been unsuccessful. *Snedigar*, 114 Wn.2d at 164.

Right-Price attempted to explain the relevance and materiality of each of its discovery requests in its memorandum in support of its motion to compel production. Right-Price generally contends that each request is likely to lead to information to substantiate its claims. But Right-Price gives no reasons specific enough to rise above mere speculation, as *Snedigarn* requires. *Snedigar*, 114 Wn.2d at 165. For example, Right-Price fails to explain how membership lists might reveal a conspiracy or how obtaining information about the citizens' groups' opposition to other developments justifies discovery of all correspondence the organizations ever generated. The trial court's comment is telling:

> I know what [Right-Price is] looking for. I don't know that [Right-Price is] going to find it in anything that [the citizens' groups] provide, but I think [Right-Price is] entitled to it. There's some kind of smoking gun there[.]

RP at 7. This expresses no more than speculation that somewhere in the mass of information sought, Right-Price may find support for its theories. This does not meet the *Snedigar* standards of providing specific reasons to justify the request for information. *Snedigar*, 114 Wn.2d at 164-65. Further, even assuming that its reasons are valid, Right-Price has never argued or shown that it has tried other means to obtain the requested information.

Thus, we conclude that Right-Price failed to meet its burden of showing the information's relevance and materiality and showing that it unsuccessfully tried other means to obtain the information. A trial court may undertake in camera review only when clearly necessary to balance the parties' competing interests regarding the discovery. *Snedigar*, 114 Wn.2d at 166. Because Right-Price made no specific showing of the relevance and materiality of the information sought, the trial court had nothing to balance, and in camera review was unnecessary.

We hold that the trial court erred in ordering production of documents for in camera review.

III. Attorney Fees

The citizens' groups request attorney fees. A prevailing party under RCW 4.24.510 is entitled to reimbursement of costs and reasonable attorney fees. RCW 4.24.510. But the citizens' groups have not yet prevailed in the underlying action and, thus, are not entitled to attorney fees.

IV. CR 11 Sanctions

The citizens' groups urge this court to impose sanctions against Right-Price under CR 11 for filing a

frivolous lawsuit. At this stage, the record does not support such a finding. We decline to award CR 11 sanctions.

We reverse and remand.

s/ARMSTRONG, C.J.

We concur:

s/HOUGHTON, J.

s/BRIDGEWATER, J.

B

FILE
IN CLERKS OFFICE
SUPREME COURT, STATE OF WASHINGTON
DATE MAY 16 2002
s/ALEXANDER, C.J.
CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RIGHT-PRICE RECREATION, LLC, a Washington limited liability company,

Respondent,

v.

CONNELLS PRAIRIE COMMUNITY COUNCIL, a Washington non-profit corporation; PIERCE COUNTY RURAL CITIZENS ASSOCIATION, a a Washington non-profit corporation; JON SALISBURY and JANE DOE SALISBURY, husband and wife; WILLIAM WRIGHT and JANE DOE WRIGHT, husband and wife; JOHN DOES 1-10 and JANE DOES 1-10,

Petitioners.

No. 71099-6

En Banc

Filed MAY 16 2002

IRELAND, J. -- Two citizens' groups sought review of a Court of Appeals' decision which held that the trial court's order compelling production of the

groups' information for in camera review violated their First Amendment privileges. Finding that the Court of Appeals should also have considered the trial court's refusal to dismiss the case, and further, that the case should have been dismissed on summary judgment, we remand for dismissal and for a determination concerning attorney fees.

Under RAP 2.4(b), the appellate court reviews orders or rulings not designated in the notice for discretionary review if they prejudicially affect the decision designated in the notice. In this case, granting the motion to dismiss would have terminated the action and precluded the designated discovery order. Therefore, we review the dismissal order herein.

FACTS

Right-Price Recreation, LLC, proposed to develop two residential subdivisions in rural Pierce County. Connells Prairie Community Council and Pierce County Rural Citizens Association, two nonprofit corporations (collectively, "citizens' groups") opposed the developments. After members of the citizens' groups spoke before the Pierce County Council and the Pierce County Hearing Examiner, Right-Price sued the groups, as well as named officers of the groups and their spouses and additional unnamed individuals.

The matter commenced in April 1999. Right-Price's complaint alleged slander and commercial disparagement; tortious interference with binding sewer agreements; tortious interference with the hearing process; and civil conspiracy.

PROCEDURAL HISTORY

In September 1999, Right-Price brought a motion to compel production of documents. Right-Price

sought discovery from both groups of (1) newsletters, bulletins, press releases, or editorials generated; (2) bank statements, financial statements, tax returns, and any other financial documentation relating to the groups; (3) membership lists, rosters, or mailing lists; (4) minutes of all meetings held; and (5) correspondence generated by the citizens' groups to public officials, elected officials, or decision makers. Right-Price sought discovery from Pierce County Rural Citizens Association of all correspondence and written documents exchanged with other nonprofit organizations. Right-Price also sought discovery from Connells Prairie Community Council of (1) written correspondence generated; (2) petitions and form letters created; (3) correspondence generated to other nonprofit organizations; and (4) documents to other nonprofit organizations generated or possessed by the group that are stored in any magnetic format.

The citizens' groups then filed a motion for protective order and a "special" motion to dismiss, claiming that they were immune from civil suit under former RCW 4.24.510 (1999), that they enjoyed common law immunity, and that the constitutional right to petition the government also provides immunity from the suit. The trial court characterized the special motion as a CR12(b)(6) motion.

Following oral argument, the trial court ordered discovery stayed and continued the hearing. Right-Price was ordered to "provide the court with sufficient affidavits and evidence of facts and claims to justify the merits of the complaint." Clerk's Papers at 78. After reviewing the materials submitted by Right-Price, the trial court denied the motion to dismiss and allowed the case to proceed.

When Right-Price renewed its motion to compel, the trial court ordered the citizens' groups to produce all of the requested materials to the court for in camera review.

The citizens' groups filed an emergency motion for stay of the trial court's order, arguing that the requests for production violated the groups' constitutional rights. The Court Commissioner of the Supreme Court granted the stay, and the notice for discretionary review was transferred to the Court of Appeals.

The citizens' groups also filed a motion for summary judgment, which the trial court continued pending resolution of interlocutory review.

The Court of Appeals granted discretionary review on the discovery issue, holding "that there is some probability that the requested discovery will harm the groups' First Amendment rights and that the developer has not shown the materiality of the information or that the information could not be otherwise obtained with reasonable efforts." *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 816, 21 P.3d 1157(2001). The Court of Appeals reversed the discovery order.

In briefing to the Court of Appeals, the citizens' groups also requested review as to whether the trial court erred by denying their motion to dismiss and by continuing their summary judgment motion. These issues were not designated in the notice for discretionary review. The Court of Appeals concluded they were unreviewable.

This Court granted the citizen groups' petition for review of the Court of Appeals' decision. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 145 Wn.2d 1001, 35 P.3d 381 (2001).

ANALYSIS

Issues

The following issues are raised by the citizens' groups in their petition for review:

(1) Whether Petitioners are entitled to interlocutory dismissal of the suit by means of a statutory writ of review or constitutional writ of certiorari;

(2) Whether the Court of Appeals erred by declining to review the denial of Petitioners' motion to dismiss and the trial court's order continuing the motion for summary judgment when neither action was designated in the notice for discretionary review; and

(3) Whether the "good faith" requirement of RCW 4.24.500 is an unconstitutional prior restraint on speech.

Statutory or Constitutional Writ

The citizens' groups assert that they are entitled to interlocutory dismissal of the suit by means of a statutory writ of review or constitutional writ of certiorari.

"A court will issue a statutory writ of review, pursuant to chapter 7.16 RCW, if the petitioner can show that (1) an inferior tribunal or officer (2) exercising judicial functions (3) exceeded its jurisdiction or acted illegally, and (4) there is no other avenue of review or adequate remedy at law." *Clark County Pub.*

Util. Dist. No. 1 v. Wilkinson, 139 Wn.2d 840, 845, 991 P.2d 1161 (2000).

The writ of certiorari provided for in article IV, section 6 of the Washington Constitution is available in narrower circumstances. *Id.* A court will not ordinarily grant a constitutional writ unless no other avenue of appeal, such as a statutory writ or direct appeal, is available. *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292-93, 949 P.2d 370 (1998).

Review under either writ is not available in the instant case because the citizens' groups sought the alternate avenue of discretionary review, which was granted by the Court of Appeals. The citizens' groups are not entitled to dismissal by means of a statutory or constitutional writ.

Rulings Not Designated in Notice - When Reviewable

The citizens' groups argue that the Court of Appeals should have reviewed the trial court's denial of their motion to dismiss and the trial court's order continuing their motion for summary judgment, even though neither was designated in the notice for discretionary review. We agree that the denial of the motion to dismiss should have been considered.

Generally, an appellate court will "review the decision or parts of the decision designated in the . . . notice for discretionary review *and other decisions in the case as provided in sections (b), (c), (d), and (e)*. RAP 2.4(a) (emphasis added). Section (b), which applies in this case, provides as follows:

> The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is

entered, or the ruling is made, before the appellate court accepts review.

RAP 2.4(b).

The trial court denied the motion to dismiss on October 28, 1999. The discovery order designated in the notice for discretionary review was filed on March 10, 2000. The order continuing the motion for summary judgment was filed on March 23, 2000. The Court of Appeals granted discretionary review on August 11, 2000. Because both of the undesignated decisions, as well as the order designated in the notice, occurred before the appellate court accepted discretionary review, the second requirement of RAP 2.4(b) is satisfied.

Reviewability of the undesignated decisions (denial of the motion to dismiss and continuance of the motion for summary judgment) then turns on whether they "prejudicially affect" the designated discovery order.

In *Adkins v. Aluminum Co. of America*, an action resulting from personal injuries, the first trial resulted in a favorable verdict for the plaintiff, but the court then granted a mistrial due to juror misconduct. The second trial resulted in a defense verdict, from which the plaintiff appealed. One of the issues on appeal was whether the appellate court should review the ruling granting the mistrial when the plaintiff had appealed from the judgment entered on the second jury's verdict. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 133, 750 P.2d 1257, 756 P.2d 142 (1988). The *Adkins* court concluded that the motion for mistrial was reviewable, reasoning as follows:

> The requirements of RAP 2.4(b) are satisfied here. The second trial would not have occurred absent the trial court's decision granting

> the motion for a mistrial; thus the decision prejudicially affected the final decision which was designated in the notice of appeal. Obviously the trial court's action granting the mistrial occurred before the Court of Appeals accepted review. *Id.* at 134-35.

In its analysis of the case before us, the Court of Appeals stated that "as *Adkins* applied the 'prejudicially affected' test, the denial of the motion [to dismiss] would be reviewable." *Right-Price Recreation*, 105 Wn. App. at 820. In other words, if the trial court had granted the motion, the case would have ended.

However, the Court of Appeals then went on to interpret *Franz v. Lance*, 119 Wn.2d 780, 836 P.2d 832 (1992), as requiring a more limited interpretation of "prejudicially affected." The court stated as follows:

> [U]nder *Franz*, the previous order prejudicially affects the order designated in the notice of appeal if the order appealed cannot be decided without considering the merits of the previous order. This requires some connection between the two other than that the appealed order would not have occurred if the earlier order had been decided differently. The issues in the two orders must be so entwined that to resolve the order appealed, the court must consider the order not appealed.

Right-Price Recreation, 105 Wn. App. at 819.

In *Franz*, an action for trespass, the trial court entered a judgment on the merits in favor of the plaintiffs. In a later order, the trial court imposed sanctions against the defendants. The defendants contended that their timely notice of appeal from the

order imposing sanctions also brought before the appellate court the underlying judgment. The *Franz* court reasoned that the notice of appeal from the award of sanctions should enable the defendants to obtain review of the underlying judgment because the award "must stand or fall based on the findings and conclusions the trial court entered in support of the . . . judgment." *Franz*, 119 Wn.2d at 782. Absent the judgment, the sanctions would not have been imposed.

Citing the language of RAP 2.4(b), the *Franz* court held that the trial court's judgment on the merits "prejudicially affected its subsequent award." *Id.* The *Franz* court purported to follow precedent; it did not disapprove of, or overrule, any earlier holdings. *Franz* is not a stricter interpretation of the "prejudicially affects" language. Rather, its holding is a reiteration of the *Adkins* court's recognition that the order appealed from would not have happened but for the first order.

Following the same logic, it would be inappropriate for the appellate court to review the order continuing the motion for summary judgment. The continuance was filed some time after the discovery order designated in the notice, and the continuance is independent of any prejudicial effect on the designated order.

The Court of Appeals correctly notes that "discretionary review is not favored because it lends itself to piecemeal, multiple appeals." *Right- Price Recreation*, 105 Wn. App. at 820. However, the Rules of Appellate Procedure do not support narrowing the scope of discretionary review as compared to the appeal process (review as a matter of right). RAP 2.3 delineates the criteria governing the acceptance of discretionary review. Once review is granted, however, the provisions governing the scope of review, which are

addressed in RAP 2.4(a) and (b), apply to both notices of appeal and notices for discretionary review equally.[1]

In sum, the Court of Appeals should not have declined to review the trial court's denial of the motion to dismiss. While the Court of Appeals may wish to limit the issues on discretionary review, its authority to do so is not supported by our case law or rules. Rather than remanding to the Court of Appeals for a determination on the dismissal, we will resolve the outstanding issues in the interest of judicial economy.

Trial Court's Decision on Motion to Dismiss

Although the citizens' groups denominated their motion as a "special" motion to dismiss, the trial court first characterized it as a failure to state a claim upon which relief can be granted under CR 12(b)(6). However, when the court ordered Right-Price to provide affidavits and evidence of facts and claims to justify the merits of its complaint, the motion should have been treated as one for summary judgment:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

---

[1] Unlike RAP 13.6, which allows the Supreme Court to specify the issue or issues as to which review is granted upon accepting discretionary review of a Court of Appeals' decision, RAP 2.4 does not allow the Court of Appeals to so limit its review of the trial court decisions it accepts for appeal or discretionary review.

When reviewing an order of summary judgment brought under CR 56, the appellate court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The reviewing court considers the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

In its summary judgment motion, "the moving party bears the initial burden of showing the absence of an issue of material fact." *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If, as in the case before us, the moving party is a defendant who meets the initial burden,

> "then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial', then the trial court should grant the motion."

Id. (footnote omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

Former RCW 4.24.510 - Applicability

The citizens' groups characterize Right-Price's suit against them as a Strategic Lawsuit Against Public Participation (SLAPP). A SLAPP primarily involves

"communications made to influence a governmental action or outcome." George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* 8 (1996). The communications result "in (a) a civil complaint or counterclaim (b) filed against nongovernment individuals or organizations . . . on (c) a substantive issue of some public interest or social significance." *Id.* at 8-9.

The citizens' groups refer to former RCW 4.24.510 as the "anti-SLAPP statute." Regardless of the label, we examine the elements of the statute and find they are applicable to this case.

Right-Price bases its complaint on allegations that the citizens' groups made defamatory statements to the Pierce County Council. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Restatement (Second) of Torts* sec. 559 (1977). Former RCW 4.24.510 provides that even if statements made at the council meetings by the citizens' groups were false, if their communications were made in good faith, they are immune from civil liability.

Because we decide this appeal on statutory grounds, we do not reach the issues of constitutional or common law immunity.

Former RCW 4.24.510 - Constitutionality of Good Faith Provision

In pertinent part, former RCW 4.24.510 states as follows:

> A person who in good faith communicates a complaint or information to any agency of federal, state, or local government . . . is immune from civil liability for claims based upon the

> the communication to the agency . . regarding any matter reasonably of concern to that agency . . . .

Although the citizens' groups rely on the statute to prevail in their defense, they claim that the statute's requirement of good faith is unconstitutional as a prior restraint on political speech. The First Amendment prohibits Congress from making any law that abridges the freedom of speech or the right "to petition the government for a redress of grievances." U.S. Const. amend. I. The Washington Constitution provides similar protections: "The right of petition . . . shall never be abridged." Const. art. I, sec. 4. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Const. art. I, sec. 5.

In keeping with *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and subsequent defamation cases, former RCW 4.24.510 affords immunity only for communications made in good faith. In a defamation action, "the proper standard for determining whether the defendant acted in good faith for purposes of RCW 4.24.510 is the actual malice standard." *Gilman v. MacDonald*, 74 Wn. App. 733, 734, 875 P.2d 697 (1994).

In applying the statute, the *Gilman* court held as follows:

> [W]here a defendant in a defamation action claims immunity under RCW 4.24.510 on the ground his or her communications to a public officer were made in good faith, the burden is on the defamed party to show by clear and convincing evidence that the defendant did not act in good faith. That is, the defamed party must show, by clear and convincing evidence, that the defendant knew of the falsity of the

communications or acted with reckless disregard as to their falsity.
Id. at 738-39.

Under the *Gilman* test, which we approve, the party alleging defamation must show, by clear and convincing evidence, an abuse of the statutory privilege amounting to actual malice. The test's requirements ensure that former RCW 4.24.510 does not unconstitutionally chill protected speech.

Dismissal Required

Under the facts presented to the trial court, Right-Price failed to establish a prima facie case of defamation. Right-Price produced a videotape of comments made by group members before the Pierce County Council, but did not identify any alleged defamatory statements. Even if there had been statements at the meetings which were claimed to be defamatory, the citizens' groups were entitled to immunity under former RCW 4.24.510, as Right-Price totally failed to establish clear and convincing evidence that the groups' statements were made with actual malice.

There is no separate evidence of facts establishing a prima facie case for tortious interference with the sewer agreements, tortious interference with the hearing process, or civil conspiracy. Accordingly, these claims must also fall.

Attorney Fees and Costs

Petitioners request an award of attorney fees and costs. Former RCW 4.24.510 states, in pertinent part, that "[a] person prevailing upon the defense provided for in this section shall be entitled to recover costs and

reasonable attorneys' fees incurred in establishing the defense." This matter is remanded to the trial court for calculation of reasonable attorney fees under former RCW 4.24.510.

Sanctions

Petitioners also request that the Court "consider imposing Rule 11 sanctions upon [Right-Price's] counsel because the suit was brought and maintained in 'bad-faith.'" Pet. for Review at 20. The appellate equivalent of CR 11, RAP 18.9, does not provide for sanctions under the circumstances of this case because there is no evidence that Right-Price has used the rules of appellate procedure for the purpose of delay or to file a frivolous appeal.

CONCLUSION

We remand the matter to the trial court for entry of summary judgment of dismissal for the citizens' groups and for determination of attorney fees under former RCW 4.24.510.

s/Ireland, Faith E.

s/Alexander, Gerry L. s/Sanders, Richard B.

s/Smith, Charles Z. s/Bridge, Bobbe J.

s/Johnson, Charles W. s/Chambers, Tom

s/Madsen, Barbara A. s/Owens, Susan J.

C

THE SUPREME COURT

C.J. Merritt
Supreme Court Clerk
Ronald R. Carpenter
Deputy Clerk/ Chief Staff Attorney

THE SEAL OF THE STATE OF WASHINGTON

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September 15, 2003

Washington State Bar Association
Ms. Joy McLean
2101 Fourth Avenue, 4th Fl.
Seattle, WA 98121-2330

Re. Supreme Court No. 71099-6- Connells Prairie Community Council v. Right Price Recreation LLC

Dear Ms. McLean:

Enclosed please find copies of all pleadings filed in the above referenced Supreme Court cause number. The Court is forwarding the materials to the WSBA for review regarding the actions of attorney Sharon L. Gain, WSBA # 27972.

Sincerely,

s/ C.J. MERRITT
Supreme Court Clerk

D

THE SUPREME COURT OF WASHINGTON

CONNELLS PRAIRIE COMMUNITY, a Washington non-profit corporation, et al.,	**JUDGMENT**
	NO. 71099-6
Petitioners.	**Pierce County No. 99-2-07026-2**
v.	
RIGHT PRICE RECREATION LLC, a Washington limited Liability, et al.,	
Respondents	

Pursuant to the Order of the Supreme Court, dated September 4, 2003, a judgment in the amount of $3,750.00 for sanctions should be entered against Sharon Gain to be paid to this court. The Clerk of the superior court in and for the county of Pierce is directed to file this judgment without payment of a filing fee, pursuant to RAP 18.9.

Seal of the Supreme Court
State of Washington

I have affixed the seal of the Supreme Court of the State of Washington and filed on the 9th day of September, 2003.

No. 71099-6
JUDGMENT

s/ C.J. Merritt
Clerk of the Supreme
Court
State of Washington

cc: Michael Gendler
Sharon Gain
Michael Gendler
Matthew Sweeney
Tim Trohimovich
Jeffrey Fisher

E

THE SUPREME COURT OF WASHINGTON

CONNELLS PRAIRIE COMMUNITY, a Washington non-profit corporation, et al.,	**ORDER**
Petitioners.	**NO. 71099-6**
v.	FILED SUPREME COURT STATE OF WASHINGTON 2003 SEP-8 A 11:25 BY s/ C.J.MERRITT CLERK
RIGHT PRICE RECREATION LLC, a Washington limited Liability, et al.,	
Respondents	

This matter came before the Court on the September 4, 2003, En Banc Conference. The Court considered Petitioners' Motion to Modify Clerk's Ruling of March 28, 2003, May 28, 2003, and June 5, 2003, Motion to Disqualify, Motion for Final Decision, Motion to Recall the Mandate in Supreme Court No. 71099-6, Petition for Extraordinary Writ and Motion for Summary Judgment in Supreme Court, and Motion to Strike Clerk's Ruling of June 27, 2003. The Court unanimously voted in favor of the following result:

Now, therefore, it is hereby

ORDERED:

No. 71099-6
ORDER

That Petitioners' motions are all denied. The Clerk is directed, pursuant to RAP 18.9, to transmit the awarded sanctions to the Pierce County Superior Court for entry of a judgment. The Clerk is also directed to forward copies of all pleadings filed by Sharon Gain in this matter, responding pleadings and orders to the Washington State Bar Association for investigation and any action it deems appropriate.

DATED at Olympia, Washington this 8th day of September 2003.

For the Court
s/ Gerry L. Alexander
Chief Justice

F

THE SUPREME COURT

July 3, 2003

C.J. Merritt
Supreme Court Clerk
Ronald R. Carpenter
Deputy Clerk/ Chief Staff Attorney

THE SEAL OF THE STATE OF WASHINGTON

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Ms. Sharon Gain
Attorney at Law
7728 190th Ave E
Bonney Lake, WA 98390

Re. Supreme Court No. 71099-6- Right Price Recreation LLC v. Connells Prairie Community Council, et al.
Court of Appeals No. 25713-I-II

Dear Ms. Gain:

The Court will consider all the pleadings filed in this matter at its September En Banc conference, including those filed by attorney Sharon Gain on July 2, 2003.

No response is required to the pleadings filed by attorney Sharon Gain unless specifically called for by the Court.

Sincerely,
s/ C.J. MERRITT
Supreme Court Clerk

CJM: jaa

G

THE SUPREME COURT

June 27, 2003

C.J. Merritt
Supreme Court Clerk
Ronald R. Carpenter
Deputy Clerk/ Chief Staff Attorney

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Ms. Sharon Gain
Attorney at Law
7728 190th Ave E
Bonney Lake, WA 98390

Re. Supreme Court No. 71099-6- Right Price Recreation LLC v. Connells Prairie Community Council, et al.
Court of Appeals No. 25713-I-II

Dear Ms. Gain:

The following pleadings were filed on June 26, 2003.

The motion to modify is set to be considered by the court at its September 4, 2003, En Banc conference. All the other motions are referred to the court to be considered at the same time.

No response to the motions is required.

I also refer to the court the issue of whether these pleadings are frivolous and whether additional sanctions

should be imposed and whether the actions of attorney Sharon Gain in this case should be referred to the Washington State Bar Association for investigation for disciplinary action.

Sincerely,
s/ C.J. MERRITT
Supreme Court Clerk

CJM: jaa

cc: Mr. Matthew Sweeney
Mr. Shawn Newman
Mr. Michael Gendler
Mr. Jeffrey Fisher
Mr. Tim Trohimovich
Mr. Gerald Horne
Honorable Kitty-Ann van Doorninck
Honorable C.C. Bridgewater
Honorable Elaine Houghton
Honorable David Armstrong

H

THE SUPREME COURT

C.J. Merritt
Supreme Court Clerk
Ronald R. Carpenter
Deputy Clerk/ Chief Staff
Attorney

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June 5, 2003

Ms. Sharon Gain
Attorney at Law
7728 190th Ave E
Bonney Lake, WA 98390

Re. Supreme Court No. 71099-6- Right Price Recreation LLC v. Connells Prairie Community Council, et al.
Court of Appeals No. 25713-I-II

Counsel:

Your PETITION FOR EXTRAORDINARY WRIT and SUMMONS, filed in no. 71099-6 was received on June 3, 2003.

Your pleadings constitute another frivolous filing in a case that has been mandated, where the court had denied your motion to recall the mandate, where you have been sanctioned for filing frivolous pleadings and where your motion to modify the sanctions was denied. An additional

sanction of $2500.00 is imposed and if all sanctions are not paid by July 10, 2003, a judgment for all sanctions due will be filed pursuant to RAP 18.9(a).

Sincerely,
s/ C.J. MERRITT
Supreme Court Clerk

CJM: jaa
cc: Mr. Matthew Sweeney
Mr. Shawn Newman
Mr. Michael Gendler
Mr. Jeffrey Fisher
Mr. Tim Trohimovich
Mr. Gerald Horne
Honorable Kitty-Ann van Doorninck
Honorable C.C. Bridgewater
Honorable Elaine Houghton
Honorable David Armstrong

THE SUPREME COURT

May 28, 2003

C.J. Merritt
Supreme Court Clerk
Ronald R. Carpenter
Deputy Clerk/ Chief Staff Attorney

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Mr. Tim Trohimovich
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505 E Denny Way #607
Seattle, WA 98122-6925

Re. Supreme Court No. 71099-6- Right Price Recreation LLC v. Connells Prairie Community Council, et al.
Court of Appeals No. 25713-I-II

Counsel:

Petition for extraordinary writ and motion for summary judgment in Supreme Court case no. 71099-6, 72876-2, 73602-2, Pierce County court 99-2-07026-2, and Court of Appeals 25713-II was received on May 27, 2003.

Counsel Sharon Gain is sanctioned $1000.00 for filing the above entitled pleading, pursuant to RAP 18.9 and the ruling entered in No. 71099-6 on November 6, 2003 (sic).

No action will be taken on the above entitled pleading because cause number 71099-6 has been mandated.

Sincerely,
s/ C.J. MERRITT
Supreme Court Clerk

CJM: jaa
Enclosure as stated
cc: Ms. Sharon L. Gain
Mr. Matthew Sweeney
Mr. Shawn Newman
Mr. Michael Gendler
Mr. Jeffrey Fisher
Mr. Tim Trohimovich

J

THE SUPREME COURT OF WASHINGTON

RIGHT PRICE RECREATION, LLC, a Washington limited liability company; MICHAEL R. MASTRO; PIERCE COUNTY; KITTY-ANN VAN DOORNINCK; STATE OF WASHINGTON, Respondents,	**ORDER** NO. 73602-2 Pierce County No. 99-2-7026-2
v.	
CONNELLS PRAIRIE COMMUNITY COUNCIL, a Washington non-profit corporation; PIERCE COUNTY RURAL CITIZENS ASSOCIATION, a Washington non-profit corporation; JON SALISBURY and JANE DOE SALISBURY, husband and wife; WILLIAM WRIGHT and JANE DOE WRIGHT, husband and wife; JOHN AND JANE DOES 1-10, Appellants	FILED SUPREME COURT STATE OF WASHINGTON 2003 MAY 28 P 4: 32 BY s/ C.J.MERRITT CLERK

Department II of the Court (composed of Chief Justice Alexander and Justices Madsen, Ireland, Chambers and Fairhurst) considered this matter at its May 28, 2003, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Clerk's Ruling is denied.

DATED at Olympia, Washington this 28th day of May, 2003.

For the Court

s/ Gerry L. Alexander
CHIEF JUSTICE

K

THE SUPREME COURT OF WASHINGTON

RIGHT PRICE RECREATION, LLC, a Washington limited liability company; MICHAEL R. MASTRO; PIERCE COUNTY; KITTY-ANN VAN DOORNINCK; STATE OF WASHINGTON, Respondents,	) Clerk's Ruling)) NO. 73602-2)))) Pierce County) No. 99-2-7026-2
v.	)
Connells Prairie Community Council, et al, Appellants	) Filed 03 March) 28 PM 2:59) By s/) C.J. Merritt) Clerk

PROCEDURAL BACKGROUND

On March 5, 2003, this Court received from the trial court clerk a copy of the Appellants' "NOTICE OF APPEAL/ NOTICE OF (sic) DISCRETIONARY REVIEW", which had been filed with the trial court clerk on March 3, 2003. A review of the pleading disclosed that it did not make specific reference to the date and nature of the trial court decision of which review was being requested; nor was a copy of any such decision attached to the notice as required by RAP 5.3(a)(b). A review of the SCOMIS computer records for the trial court likewise failed to indicate the entry of a recent decision of which review might (sic) requested. The notice in its somewhat rambling texts did make reference to dates of decisions of this Court, presumably entered in either Supreme Court cause

number 71099-6 and/ or 72876-3 (as these numbers appear in the caption of the notice).

By letter dated March 5, 2003, the Deputy Clerk advised the parties that the notice would be held until March 24, 2003, to allow Ms. Gain, counsel for the parties filing the notice, the opportunity to file with this Court a copy of a trial court order or judgment (decision) of which review is being sought. The letter warned that the failure to comply with RAP 5.3 by not later than March 24, 2003, would most likely result in dismissal of the matter. As of this date this Court has not been provided a copy of a trial court decision (order or judgment) of which review is sought. Additionally, based upon both a telephonic discussion of the matter with Ms. Gain on March 12, 2003 (she called this Court), as well as representations contained in her letter to this Court dated March 24, 2003, it is abundantly clear that no new decision of the trial court exists that would be the proper subject matter of either a notice of appeal or notice for discretionary review. Also, a check with the trial court clerk's office on March 12, 2003, by one of our support staff, indicated that no new decision existed. The notice accordingly appears to be an improper attempt to file a notice seeking additional review reference Supreme Court cause number 71099-6. That matter was resolved by an opinion filed in this Court on May 16, 2002; with the mandate being issued on June 13, 2002. On July 29, 2002, Ms. Gain filed a motion to stay the trial court and to recall the mandate in Supreme Court number 71099-6. By order dated September 4, 2002, both requests were denied by a Department of this Court. Undeterred, Ms. Gain filed yet more pleadings, and finally on November 6, 2002, the Clerk of this Court imposed a

$250 sanction upon Ms. Gain for a frivolous filing. To date, she has not paid the sanction, nor did she file a timely motion to modify the Clerk's imposition of a sanction.

ISSUE

Should the notice seeking review be dismissed?

RULING

The notice seeking review failed to include a copy of the decision of the trial court of which review is sought in violation of the clear language of RAP 5.3. The simple fact of the matter seems to be no copy of the decision was included, nor subsequently furnished to this Court, because none exists. More troubling than the failure to comply with the rules is the apparent resolve of Ms. Gain to refuse to accept that this Court's decision in Supreme Court cause number 71099-6 is final. Her continued procedural maneuverings in this matter evidence not only a lack of willingness to comply with the RULES OF APPLELLATE PROCEDURE (RAP), but also bad faith and a continued willingness to file frivolous pleadings. Therefore, I have concluded that it is appropriate and just that the request for review in this matter, Supreme Court cause number 73602-2, must be dismissed. It is ordered that Supreme Court cause number 73602-2 is dismissed with prejudice. Additionally, given the repetitive nature of Ms. Gain's filing of frivolous pleadings in this Court, I am sanctioning her personally in

the amount of $500. Said sanction shall be paid to this Court by not later than April 15, 2003.

A person aggrieved by this ruling may file a motion to modify the ruling by not later than 30 days after this date; see RAP 17.7.

DATED at Olympia, Washington this 28th day of March 2003 at 2:17 p.m.

s/ RONALD R. CARPENTER
SUPREME COURT DEPUTY
CLERK

L

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR PIERCE COUNTY
FILED DEPT. 20 IN OPEN COURT
JULY 26 2002 PIERCE COUNTY
CLERK BY s/ Deputy

RIGHT PRICE RECREATION, LLC,
Plaintiff,
v.
CONNELLS PRAIRIE COMMUNITY COUNCIL) et al.,
Defendants.

No. 99-2-07026-2
s/ KAD
~~[PROPOSED]~~ FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER AWARDING ATTORNEYS' FEES TO DEFENDANTS CONNELLS PRAIRIE COMMUNITY COUNCIL AND SALISBURY

This matter comes before the Court ~~on the application of defendants Connells Prairie Community Council and Salisbury (hereafter "CPCC") for an award of reasonable attorneys' fees. The application is made~~ pursuant to RCW 4.24.510, and pursuant to the Supreme Court's ruling in this case that defendants are entitled to recover fees and costs pursuant to RCW 4.24.510 and remanding to this Court for a determination of fees and costs. s/ KAD

[*Handwritten-reviewed the files and records in this case*]

The Court has ~~received and considered CPCC's motions for fees which was submitted to the Supreme Court, together with the declarations of attorneys Shawn T. Newman and~~

Ms. Gain voluntarily left the Courtroom before presenting oral argument. The Court has questions regarding Ms. Gain's billing, which questions were left unanswered because Ms. Gain left. It would be prejudicial to other attorneys and parties to involved to delay entry of this order as to the fees of the other attorneys. The Court makes no finding or decision as to Ms. Gain's fees in this order.

ss/ KAD

1A

~~Michael W. Gendler submitted in support of the motion~~/ and supporting declarations submitted by Sharon Gain on behalf of defendants Pierce County Rural Citizens Association and Wright (hereafter "PCRCA"), plaintiff Right Price Recreation, LLC's opposition to PCRCA's motion, the motion and supporting declaration of Annalee Cobbett for attorneys' fees she incurred as counsel for CPCC, the Supplemental Declaration of Michael W. Gendler Re: Fees, and the Supplemental Declaration of Shawn Newman in Support of Additional Award of Reasonable Attorneys' Fees, Costs, and Expenses. s/ KAD

On July 19, 2002, this Court heard the argument of counsel and entered an order dismissing plaintiff's claims with prejudice, together with an order awarding the fees requested by Gendler and Newman, providing for supplementation of those fee requests for time spent after the Supreme Court remand, and requesting supplemental declarations from attorneys Cobbett and Gain in support of their applications. The Court continued the matter to July 26, 2002.

The Washington Supreme Court has held that a fee award must be based on an adequate record, including findings of fact and conclusions of law. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Accordingly, and even though the fees and costs requests submitted by CPCC's counsel are not opposed by plaintiff, the Court has reviewed the requests independently and now makes the following findings, ~~conclusions, and order.~~ s/ KAD

FINDINGS OF FACT

1. Defendants are the prevailing parties. They have achieved success in defense of this action, having secured dismissal of all of plaintiff's claims with prejudice.
2. This was a complex and difficult case. To achieve dismissal, defendants were required to take an

interlocutory appeal. In addition to having to litigate the merits of a discovery order and of their entitlement to dismissal of plaintiff's claims, the attorneys for defendants had to coordinate among counsel to address the different litigation strategies pursued by PSRCA (*sic*) and CPCC.

3. Plaintiff Right Price Recreation, LLC, stated in its response to the fee motion submitted by Ms. Gain on behalf of PCRCA that Right Price was not opposingthe[***Handwritten-by Newman,Gendler and Cobbett***] fee request submitted on behalf of ~~CPCC.~~ [***Handwritten-Attorney Shawn Newman has represented all defendants throughout this matter. The court is not aware of any notice of change in the status of Newman's representation.***]

4. The Court has reviewed the declaration of attorney Shawn Newman submitted to the Supreme Court and the supplemental declaration of attorney Newman, which set forth in detail the time devoted to this matter by Mr. Newman based on contemporaneously maintained time records. The Court has determined that the time devoted by Mr. Newman was reasonable and necessary to the litigation, does not include duplication, and reflects time efficiently spent as counsel for ~~CPCC.~~ s/ KAD [***Handwritten-defendants***]

5. The Court has reviewed the declaration of Michael W. Gendler submitted to the Supreme Court and the supplemental declaration of attorney Gendler, which set forth in detail the time devoted to this matter by Mr. Gendler based on contemporaneously maintained time records. The Court has determined that the time devoted by Mr. Gendler was reasonable and necessary to the litigation, does not include duplication, and reflects time efficiently

[***Handwritten-defendants***]

spent as counsel for ~~CPCC.~~ s/KAD

6. Attorney Annalee Cobbett initially represented [***Handwritten-defendants***] ~~CPCC,~~ and devoted time to the initial defense of the case and to helping [***Handwritten-defendants***] ~~CPCC~~ find qualified counsel with experience in SLAPP litigation. Ms. Cobbett's declaration sets forth in detail the time she devoted to the case based on her contemporaneously maintained time records. The time devoted to the case by Ms. Cobbett was reasonable and necessary to the litigation, and was time efficiently spent [***Handwritten-defendants***] in the representation of ~~CPCC.~~ As stated and incorporated by this reference, the Court previously has found that there is no dispute concerning Ms. Cobbett's hours. s/ KAD
7. Mr. Newman has requested that his time be compensated at the hourly rate of $200. The Court finds that hourly rate to be supported by Mr. Newman's skill and experience, including his experience specific to related types of litigation including SLAPP litigation, various types of public interest litigation, and civil rights litigation. The Court finds that $200 per hour is a reasonable hourly rate for attorney Newman.
8. Mr. Gendler has requested that his time be compensated at the hourly rate of $300. The Court finds that hourly rate to be supported by Mr. Newman's skill and experience, including his experience in SLAPP litigation and civil rights litigation. The Court finds that $300 per hour is a reasonable hourly rate for attorney Gendler.
9. The Court has considered the supplemental declaration by attorney Cobbett pursuant to the Court's order of July 19, 2002 requesting that Ms. Cobbett provide further information to support her requested hourly rate. On the basis of Ms.

Cobbett's initial declaration and on her supplemental declaration,the Court hereby finds that $130 is a reasonable hourly rate for the services of Ms. Cobbett.

s/ KAD

10. Pursuant to the above findings, a reasonable attorneys' fee for the services of Mr. Newman is $121,390.
11. Pursuant to the foregoing findings, a reasonable attorneys' fee award for the services of Mr. Gendler is $11,550.
12. Pursuant to the foregoing findings, a reasonable attorneys' fee award for the services of Ms. Cobbett is $5,226. s/ KAD

[*Handwritten-defendants*]

13. ~~CPCC has~~ incurred $986.56 in costs, which were awarded in this Court's order of July 19, 2002.

CONCLUSIONS OF LAW

1. Any of the foregoing findings of fact which should be considered as conclusions of law are adopted as such. Any of these conclusions which should be considered as findings of fact are adopted as such.

[*Handwritten-defendants*]

2. The time devoted by the attorneys for CPCC was reasonable and necessary to the successful outcome of their defense against plaintiff's claims. s/ KAD
3. The hourly rates of counsel as submitted and as found by the Court above are reasonable hourly rates and fees should be awarded at those rates.

Based on the foregoing findings of fact and conclusions of law, the Court now enters the following order:

1. Defendants ~~CPCC~~ are hereby awarded their reasonable attorneys' fees and costs. s/ KAD
2. The reasonable attorney's fee for the services of attorney Newman is $121,390.00, which is hereby awarded.

3. The reasonable attorney's fee for the services of attorney Gendler is $11,550.00, which is hereby awarded.
4. The reasonable attorney's fee for the services of attorney Cobbett is $5,226, which is hereby awarded.
5. The costs previously awarded in the amount of $986.56 are confirmed.

Dated this 26th day of July, 2002.

s/ Kitty-Ann van Doorninck
HONORABLE KITTY-ANN
VAN DOORNINCK
SUPERIOR COURT JUDGE

Presented by:

SHAWN TIMOTHY NEWMAN, INC., P.S.
By: s/ Shawn T. Newman by MWG
Shawn T. Newman WSBA No.14193

LAW OFFICES OF MICHAEL W. GENDLER, PLLC
By: s/ Michael W. Gendler
Michael W. Gendler WSBA No. 8429
Attorneys for Defendants CPCC and Salisbury

FILED DEPT. 20 IN OPEN COURT
JULY 26 2002 PIERCE COUNTY CLERK
By: s/ illegible Deputy
STATE OF WASHINGTON, County of Pierce ss: I, Bob San Soucie, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office. IN WITNESS THEREOF, I hereunto set my hand and the Seal of this Court this 30 day July, 2002. Bob San Soucie, Clerk By s/ S. Culter? Deputy

STAMP JULY 30 2002

M

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

FILED DEPT. 20 IN OPEN COURT
JULY 19 2002
Pierce County Clerk
By: s/ ILLEGIBLE
Deputy

Right Price Recreation
Plaintiff,
vs.
Connells Prairie
Defendant.

MEMORANDUM OF JOURNAL ENTRY

No. 99-2-07026-2
ORDER

Hearing held on July 19, 2002, pursuant to Supreme Court order dated May 16, 2002, remanding the case for entry of summary judgment of dismissal for the citizens' groups and for determination of attorney fees. All parties attended by counsel, the court finds---

1) Grants order of dismissal with prejudice;
2) Grants attorneys Gendler & Newman requested fees and $986.56 costs. Gendler $8700; Newman $119,910.00. The court will grant additional fees for preparing for this hearing.
3) As for attorney Cobbett, the court asks for a supplemental declaration as to her rate. There is no dispute concerning her hours.
4) As for attorney Gain, the court asks for supplemental briefing on issue of contemporaneous fees.
5) The case is continued to July 26th.

s/SHARON GAIN **OBJECT STRONGLY-DISAGREE WITH ABOVE ORDER-ALL OF THE ABOVE FINDINGS SHOULD BE CONTINUED UNTIL JULY 26, 2002.** s/ S. GAIN

s/ SHAWN NEWMAN
Shawn Newman

s/ KITTY-ANN VAN DOORNINCK
Kitty-Ann van Doorninck
Judge

s/ ANNALEE COBBETT
Annalee Cobbett WSBA #22685

The Hon. Kitty-Ann van Doorninck
Motion to Dismiss
Hearing Date: July 19, 2002

PIERCE COUNTY SUPERIOR COURT
STATE OF WASHINGTON

FILED DEPT. 20 IN
OPEN COURT
JULY 19 2002
Pierce County Clerk
By s/ ILLEGIBLE
Deputy

RIGHT PRICE RECREATION LLC, a Washington limited Liability, Plaintiff, v. CONNELLS PRAIRIE COMMUNITY COUNCIL, a Washington non-profit corporation; PIERCE COUNTY RURAL CITIZENS ASSOCIATION, a Washington non-profit corporation; JON SALISBURY and JANE DOE SALISBURY, husband and wife; WILLIAM WRIGHT and JANE DOE WRIGHT, husband and wife; JOHN AND JANE DOES 1-10, Defendants	)	No. 99-2-07026-2 **ORDER DISMISSING PLAINTIFF'S CLAIMS WITH PREJUDICE**

This matter came before the Court on defendants motion for an order entering judgment dismissing the plaintiff's claims in this action. The court, recognizing the Supreme

Court's ruling in Right Price Recreation, LLC v. Connells Prairie Community Council, et al., [No. 71099-6 (Slip Op. May 16, 2002)], hereby:

1. Dismisses all of plaintiff's claims with prejudice;
2. Preserves all of defendants' counterclaims for trial;
3. Grants defendants reasonable attorneys fees pursuant to RCW 4.24.510;
4. Grants defendants their costs and expenses allowable Under RCW 4.24.510; CR 54; and RCW 4.84; and
5. Finds that, pursuant to CR 54(b), specifically directs entry of a final judgment as to the plaintiff's claims finding there is no just reason for delay.

s/ KITTY-ANN VAN DOORNINCK
Judge

Presented by:
s/ Shawn Timothy Newman
Shawn Timothy Newman, Inc., P.S., Inc., Attorney at Law
[WSBA 14193] Attorney for Defendants
2507 Crestline Dr., NW
Olympia, WA 98502
PH: 360/866-2322
FAX: 360/866-2304

Approved by:
s/Annalee Cobbett
Annalee Cobbett
Attorney at Law
PMB 1375
122 E. Pike Street
Seattle,WA 98122-3916
PH: 206/371-7551
FAX:1-208-441-4410

Approved by:
BLANK
Matthew Sweeney
[WSBA 18262]
8 Tacoma Ave., N.,
P.O.Box 7935, Tacoma, WA 98406-0935
PH: 253/565-1728
FAX: 253/565-0968

FILED DEPT. 20
IN OPEN COURT
JULY 19 2002
Pierce County Clerk
By: s/ ILLEGIBLE
DEPUTY

s/ SHARON GAIN
7728 190TH Ave. E.
Bonney Lake, WA 98390
PH: 253/ 863-5623
FAX: 253/ 863-4053

s/ MICHAEL GENDLER
Michael Gendler [WSBA 8429]
Attorney for CPCC
Ste. 1015- 4th & Pike Bldg.
1424- 4th Ave.,
Seattle, WA 98101-2297
PH: 206/ 621-8868
FAX: 206/ 621-0512

THE SUPREME COURT OF WASHINGTON

RIGHT PRICE RECREATION LLC, a Washington limited Liability,	) **SUPPLEMENTAL**) **JUDGMENT**
Respondent	) NO. 71099-6) Pierce County No.) No. 99-2-07026-2
v.	)
CONNELLS PRAIRIE COMMUNITY COUNCIL, a Washington non-profit corporation a Washington non-profit corporation; PIERCE COUNTY RURAL CITIZENS ASSOCIATION, a Washington non-profit corporation; JON SALISBURY and JANE DOE SALISBURY, husband and wife; WILLIAM WRIGHT and JANE DOE WRIGHT, husband and wife; JOHN AND JANE DOES 1-10,	) C/A No. 25713-II)))) FILED) SUPREME) COURT) STATE OF) WASHINGTON) 2002 JUL 24) P 12:07 by) s/ C.J.MERRITT
Petitioners.	)

An opinion was filed in the above referenced cause on May 16, 2002, in which Petitioners prevailed and the opinion became final on June 5, 2002. The Clerk issued a Ruling on Costs on June 14, 2002, awarding costs on appeal to Petitioners, and no objections thereto having been made.

Therefore, pursuant to the Clerk's ruling, costs in the amount of $2,593.93 are awarded to the Petitioners. Reasonable attorneys' fees were awarded to the

Petitioners, pursuant to RCW 4.24.510. The amount of the reasonable attorneys' fees shall be calculated by the trial court.

I have affixed the seal of
the Supreme Court of the
State of Washington and
filed this Supplemental Judgment
the 24th day of
July, 2002.

s/ C.J. MERRITT
Clerk of the Supreme Court,
State of Washington

cc: Michael Gendler
Shawn Newman
Matthew Sweeney
Sharon Gain

THE SUPREME COURT OF WASHINGTON

RIGHT PRICE RECREATION LLC, a Washington limited Liability,	) **CLERK'S**) **RULING**) **ON COSTS**
Respondent	) NO. 71099-6) Pierce County No.) No. 99-2-07026-2
v.	)
CONNELLS PRAIRIE COMMUNITY COUNCIL, a Washington non-profit corporation a Washington non-profit corporation; PIERCE COUNTY RURAL CITIZENS ASSOCIATION, a Washington non-profit corporation; JON SALISBURY and JANE DOE SALISBURY, husband and wife; WILLIAM WRIGHT and JANEDOE WRIGHT, husband and wife; JOHN AND JANE DOES 1-10,	) C/A No. 25713-II)))) FILED) SUPREME) COURT) STATE OF) WASHINGTON) 2002 JUN 14) P 12:54 by) s/ C.J.MERRITT CLERK
Petitioners.	)))

PROCEDURAL BACKGROUND

The petitioners substantially prevailed in this review. The court in its opinion awarded reasonable attorneys fees to the Petitioners, pursuant to RCW 4.24.510. The Petitioners filed with this court their cost bill, requests for reasonable attorneys' fees and affidavits in support of reasonable attorneys' fees.

RULING

Costs claimed by Petitioners in their cost bill are all awardable pursuant to RAP 14.3. Reasonable attorneys' fees were awarded to the Petitioners in the court's opinion. I apologize to the parties for not noticing until now that this court remanded the matter to the trial court for calculation of the attorneys' fees. This means that the Petitioners will have to re-title their requests and affidavits and file them with the trial court.

CONCLUSION

Costs in the amount of $2593.93 are awarded to the Petitioners. Reasonable attorneys' fees were awarded to the Petitioners, pursuant to RCW 4.24.510. The amount of the reasonable attaorneys' fees shall be calculated by the trial court.

Exceptions to this ruling must be filed within 30 days of the date of this ruling. See RAP 17.7.

DATED at Olympia, Washington this 14th day of June, 2002.

s/ C.J. MERRITT
SUPREME COURT CLERK

P

FILED
SUPREME COURT
STATE OF WASHINGTON
2002 JUN 13 A 10:04
BY s/ C.J. MERRITT
CLERK

THE SUPREME COURT OF WASHINGTON

RIGHT PRICE RECREATION LLC, a Washington limited Liability,	**MANDATE**
	NO. 71099-6
Respondent	Pierce County No. 99-2-07026-2
v.	
CONNELLS PRAIRIE COMMUNITY, a Washington non-profit corporation, et al., CONNELLS PRAIRIE COMMUNITY COUNCIL, a Washington non-profit corporation; PIERCE COUNTY RURAL CITIZENS ASSOCIATION, a Washington non-profit corporation; JON SALISBURY and JANE DOE SALISBURY, husband and wife; WILLIAM WRIGHT and JANE DOE WRIGHT, husband and wife; JOHN AND JANE DOES 1-10, Petitioners.	C/A No 25713-II

THE STATE OF WASHINGTON TO: The Superior Court in and for Pierce County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on May 16, 2002, became the decision terminating review of this Court in the above titled cause on June 5, 2002. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Costs and/ or attorney fees, if any, will be taxed by supplemental judgment.

I have affixed the seal of the
Supreme Court of the
State of Washington and
filed this Mandate this 13th
day of June, 2002.

s/ C.J. MERRITT
Clerk of the Supreme Court,
State of Washington

cc: Honorable Kitty-Ann VanDoorninck, Judge
Pierce County Superior Court
Tim Trohimovich
Michael Gendler
Shawn Newman
Matthew Sweeney
Sharon Gain
Jeffrey Fisher
Reporter of Decisions

AFFIDAVIT OF SHARON LEE GAIN, WSBA 27972, RE: WSBA FILE 03-01521, DATED OCTOBER 7, 2003

My name is Sharon Lee Gain. I am over 18 years old and am competent to testify as a witness. I reside at 7728 190th Ave East, Bonney Lake, WA 98390, Pierce County. I swear, under penalty of perjury, under the laws of the State of Washington, that the following statements are true:

1. I graduated from the Seattle University School of Law in 1997. I completed a six-month internship with the Tacoma City Prosecutor's Office in December 1997. Because of physical limitations and the effects of practicing law full-time, I realized I could not practice law on a full-time basis and found a position working from my home with Good Samaritan Hospice. I currently work as a triage Hospice RN from my home for Franciscan Hospice.

2. In October 1997, I commented before the Pierce County Council opposing an Urban Growth Amendment proposed by Right Price LLC. The Pierce County Council denied the Right Price UGA Amendment in 1995, 1996 and 1997. I met CPCC members during the Council hearing of 1997.

3. Pierce County Rural Citizens Association (PCRCA) was formed in 1998. I am a member of the two former defendant nonprofit corporations, Pierce County Rural Citizens Association (PCRCA) and Connells Prairie Community Council (CPCC). I am also the registered agent for PCRCA.

4. From 1997 to 1999, we noted a growing number of projects approved by the Pierce County Hearing

Examiner outside the designated UGAs on designated Agricultural/ Forest/ Rural lands. There were no urban facilities in the approved areas and most of the approved projects were located on lands that had special tax rates because of their designation. The project approvals did not comply with the state statutes regarding conversion of the lands. Many project approvals were located on steep slopes, critical areas (wetlands etc) or adjacent to waterways or protected wildlife areas. Group members, who lived in the designated rural areas, were increasingly upset because of Pierce County's noncompliance with the goals and directives of the Growth Management Act (GMA). Moreover, the Hearing Examiner approved projects that required legislative action under the GMA, such as Comprehensive Plan Amendments. While Comprehensive Plan Amendments must undergo scrutiny by the State Office of Financial Management (OFM) to ensure compliance with the GMA, Examiner-approved projects bypass the process.

5. Pierce County submitted its Comprehensive Plan to the State in 1995 amid a great deal of controversy. The Growth Management Hearings Board ruled that Pierce County's Comprehensive Urban Growth Area (CUGA) was too large for the projected population---Cascadia, a proposed city of 15,000-20,000 and Bonney Lake were removed from the CUGA. Bonney Lake was designated a rural community.

6. The Groups obtained documents indicating that the Examiner, Stephen Causseaux, in 1994-1997 increasingly contracted with nearly every small town/ city in Pierce County as the local hearing examiner, as well as the Pierce County Hearing

Examiner. In 1998, Pierce County paid Mr. Causseaux over $200,000 for his services. I reviewed a number of Mr. Causseaux's decisions—a large number did not comply with the zoning designation nor did they comply with the GMA's tier and concurrency requirements. Project approvals outside the designated UGAs were de facto UGA amendments, illegally enlarging the UGAs required under the GMA.

7. I was particularly concerned with Cascadia, surrounded by major rivers and streams and very steep slopes. It was designated Forestlands and had a large number of critical areas, as well as a rare Blue Heron nesting site. I did extensive research, including legislative history, and came to the conclusion that it required a Comprehensive Plan Amendment. However, Stephen Causseaux was scheduled to consider the project, not the Council. **What was particularly important was the project's huge infrastructure requirements, including a new sewer plant, a new highway, new roads. Although Cascadia was designated a "self-contained" community, the 5,000 acre site was isolated in a rural area. Based upon Mr. Causseaux's other decisions involving smaller projects, Cascadia's owners would pledge to pay for infrastructure to insure approval and later transfer the infrastructure costs to the taxpayers.** Although the project would have huge impacts on all the surrounding areas, my husband and I were practically the only citizens who attended the hearings. We later appealed Cascadia's approval to the Growth Management Hearings Board.

8. Mr. Causseaux never notified anyone during the hearings of his employment with the cities affected

by or who benefited from the project approvals. He always opened the hearings by stating his firm handled family law cases. Group members heard rumors that the City of Bonney Lake also retained Mr. Causseaux's services in October 1998. Mayor Bob Young confirmed Mr. Causseaux's contract with the City of Bonney Lake during the Bonney Lake City Council meeting on October 30, 1998.

****9. **I called the Washington State Bar Association's Disciplinary Board on October 23, 1998 and November 5, 1998, according to my notes. The number was (206) 674-6212 when the Bar returned my call. I wrote down the name of the person as Felice Cungle ??? I did not give my name or Mr. Causseaux's name but explained that the County Examiner was also obtaining contracts with the cities within the county etc. The Bar advisor stated it sounded like a conflict under RPC 1.12. I explained that I was an inexperienced new graduate and that this person (Causseaux) was a very powerful person--I was very hesitant about objecting or saying anything. The advisor suggested that we "tell our government officials" and said, "You're also a citizen, aren't you?" when I hesitated.**

We told our government officials—the SLAPP was filed in April 1999. The case and litigation of over four years is the result of those communications. My first instincts were correct and the Bar was wrong because I am one of the Jane Does 1-10.

9. After group discussions, we decided to go before the Pierce County Council and simply request an alternate Examiner/ firm because of Mr. Causseaux's contractual relationship with the City of Bonney

Lake, especially when Mayor Bob Young's stated goals were expansion and rapid growth. We appeared before the Council on November 3, 1998 and I appeared on November 17, 1998. The Council determined there was no conflict and ruled Mr. Causseaux and members of his firm could decide land use issues in the Bonney Lake-Buckley area. What was particularly upsetting was the fact that the Council denied the Right Price UGA amendment three times, three years in a row. Right Price then placed the proposal to the lower authority, Examiner Causseux, who subsequently approved the project in March 1999. Because the Council rejected the projected three times in three years, I believe the Examiner was without legal authority to consider or approve the Right Price project.

10. I incorporate by reference the written documents submitted into the record, including the affidavits submitted to the trial court and Supreme Court. The briefs and affidavits, especially the affidavit in Appendix page 662, which tells our story. I certify, under penalty of perjury, that they are all true, with one exception, which is my affidavit for attorney fees submitted to the trial court and Supreme Court. App. 662, 694,697, 989. At the time I submitted the petition for attorney fees, I believed I had to submit a Notice of Appearance before the courts would recognize me as the groups' attorney. I later learned in September that is not true. My mistake did not harm anyone nor did I benefit in any way from my mistake.

11. The Supreme Court Clerk directed the attorneys to re-file the petitions for attorney fees in superior court. Attorney Newman eventually filed his petition because I pressured him but Michael

Gendler NEVER re-filed his petition. There were over $300,000 in attorney fees at issue. The attorneys also knew several defendants wanted counterclaims to go forward, or a SLAPPback. At the 7-19-02 hearing, attorney Newman, without notice, hand-wrote an order (App. 49) awarding attorney fees but omitted counterclaims, while dismissing the entire case with prejudice. Newman exerted a great deal of pressure upon me to sign the order---I refused to sign because I thought everything should be continued until the 7-26-02 hearing and Gendler had not submitted his petition as directed by the Supreme Court. Gendler submitted his petition in ex parte communications with Judge van Doorninck's office but did not file or serve the purported petition which Judge van Doorninck awarded attorney fees. My objections were omitted or deleted from the 7-19-02 hearing tape—I later wrote an affidavit of recollected hearing in late July 2002. I do not believe Newman intended to relinquish his attorney fees to CPCC and Salisbury, who paid him for his services.

12. Michael Gendler and Judge van Doorninck prepared and signed an ex parte order, which contained false statements of fact, including the statement that Shawn Newman "represented all defendants at all levels." App. 52. Shawn Newman NEVER represented PCRCA and William Wright in the Washington State Supreme Court; Newman and Gendler acted solely in the interests of Right Price. *See, Motion to Modify Clerk's Ruling of March 28, 2003 in Appendix 162.* Because of the large amount of money involved and the intentional actions of the attorneys and Judge van Doorninck in the trial court, I believe the actions/ orders more than meet the criteria for a federal/ state RICO case. Moreover,

the attorneys sought to capitalize on their misdeeds by petitioning the Washington Supreme Court for the awarded attorney fees in October 2002; the Court denied their motions. Newman later sought to withdraw from the case in 2003 and we objected under the circumstances.

13. Please review the Petition for Extraordinary Writ and Summary Judgment brief on pages 195 and 227 and Attachment A. Everything I wrote and submitted to the Washington State Supreme Court was well-grounded in fact and law. I spent hundreds, if not thousands, of hours researching and writing. I did not have the experience to pursue the individuals' counterclaims---this was my first "real" case, except for several GAL cases and land use hearings. We intended to appeal to the US Supreme Court after the Washington Supreme Court dismissed our case without prejudice. However, I discovered when researching the appeal that we did not have a "final decision" that determined all the rights and liabilities of all the parties. I came to realize that a trial was unnecessary---we were immune from suit by statute since 1999. Therefore, I filed the Motion for Summary Judgment, which would have determined all the rights and liabilities of all the parties in May 2003.

14. I filed the enclosed Appendices and petitions with the US Supreme Court on August 26, 2003. The Court directed me to make some changes---those letters are enclosed. I am a named party now and will petition the court pro se; the other named individuals will also petition and sign the documents on their own behalf and on behalf of the groups. The Washington State Supreme Clerk made it clear I would not be eligible for the required letter

of good standing. Moreover, I do not know two attorneys admitted to the US Supreme Court Bar. The Court's letters are dated September 8, 2003 and the Court gave us 60 days to resubmit corrected petitions. I must complete them this week and resubmit them. I request that you take no further action until the Supreme Court issues its decision granting or denying review.

15. This case was an "accident" that came to us---I did not seek the litigation. However, the named individuals were also my friends and they trusted me. I thought we were safe in a traditional open public forum---I was wrong. I have taken no compensation for my work and time; we shared the costs. I have had to endure ongoing threats, humiliation and harassment for four and a half years, including at my job as an RN. I am currently being "targeted" at my job, again during a critical period. However, this time it is more serious---to the point of my employer threatening my nursing license also. I was suspended without pay four weeks ago without cause. We have approximately $500 in our checking account and our home, which we may lose in 3-4 months. This case has dramatically impacted the lives of me and my family. My son's childhood is affected forever. My health was clearly negatively impacted and my poor wonderful husband has had to endure great suffering because of this case.

No one would help us and the sole means of defending ourselves was Internet research, a telephone and a home computer. I have no practice or office. So, while we still have our home, I will finish the appeal. If the Supreme Court denies review, that is the end. I will go back on disability next year and we will move to an apartment. I am not trying to be difficult but, as I stated to the

Washington Supreme Court, I could never pay the sanctions because thoughts and ideas cannot be subjected to punitive actions and survive. I will not subject me or my family to additional defensive proceedings when I am also a citizen with constitutional rights. If you believe I did anything to harm the legal profession or the defendants, I will not contest allegations. Although I am very sad at the moment, my conscience is clear---everything written or done was in good faith. I did no harm to anyone and I must rely on what I know and understand.

Thank you very much for your patient understanding.

I swear, under penalty of perjury, that the above statements are true. Signed this day, 7th day of October 7, 2003 in Bonney Lake, Pierce County, State of Washington.

s/ SHARON LEE GAIN
Sharon Lee Gain,
WSBA 27972

Sharon Gain
7728 190th Ave East
Bonney Lake, WA 98390

October 7, 2003

Washington State Bar Association
Office of Disciplinary Counsel
WSBA 03-01521
2101 Fourth Ave, Suite 400
Seattle, WA 98121-2330

Dear Ms. Congalton:

I am enclosing what I believe to be relevant information, including the Appendix filed with the US Supreme Court on September 2, 2003. Nearly all of the pleadings are included in the Appendix for easy reference. If, after consideration of the information in the Appendix, you find you do not need to retain the Appendix, could you possibly return it because it is our only extra copy; the books were produced at great expense. I hope the Supreme Court sent a copy of the tape of the 1998 County Council hearing, which was the basis for the original lawsuit. The Court rendered its decision in the original case on May 16, 2002. However, to date, the defendants have yet to obtain any remedy.

It is difficult to respond or what Rules were allegedly violated, especially when our right of appeal was dismissed without prejudice on October 29, 2002---the case was not transferred. Right Price filed the Strategic Lawsuit against Public Participation (SLAPP) against the groups in April 1999. I was a member of both groups; I also appeared before the County Council on November 3, 1998. I cited the advice provided by your office---that the Pierce County Hearing Examiner's

decisions in the Bonney Lake/ Buckley area could be in violation of RPC 1.12. The groups requested disqualification of the Examiner and his firm because he was also the Hearing Examiner for the City of Bonney Lake, as well as nearly every city/ town in Pierce County.

The Groups' statements were polite and reasonable. However, Right Price sued the Groups, John and Jane Does 1-10 and Group Presidents for unspecified damages in April 1999. I thought we were safe in a traditional public forum. I was wrong. It is now 2003 and the lawsuit continues. I did nearly all the writing and research and attorney Shawn Newman was counsel of record until May 2001. I did not have any experience and my source of income was as a Hospice RN. This is my only case and innocent people rely on me to appeal until the US Supreme Court declines review. After three years, the Washington Supreme Court agreed we were immune from the SLAPP but we have yet to obtain a "final decision." The sanctions and denial of the Washington Supreme Court's decision not to consider the Petition for Extraordinary Writ and Summary Judgment are included in the appeal. *See*, Enc. Petitions; App. 95 and 227; and Attachment A App. 369. I am attaching the letters from the US Supreme Court, which requested some revisions with the expectation that we will file corrected petitions within sixty days.

I filed a Notice of Appearance and Motion for Discretionary Review on behalf of PCRCA, John and Jane Does 1-10 and President William Wright in May 2001, after attorney Shawn Newman refused to appeal to the Washington Supreme Court. The Court granted review on October 30, 2001; Newman and attorney Michael Gendler filed a Notice of Appearance in the Supreme Court on November 1, 2001, purporting to

represent the other group, CPCC, and President Jon Salisbury. I later realized that Newman and Gendler failed to join CPCC and Salisbury, as required by the RAPs---CPCC is not covered by the decision if the RAPs are applied. Right Price could then seek to recall the mandate "within a reasonable time" because there are no specific appeal requirements.

In the Petition for Review, I requested attorney fees, per former RCW 4.24.510 (mandatory for prevailing parties), that our counterclaims go forward and sanctions against the Right Price attorney, Matthew Sweeney. The Court's decision of May 16, 2002 was silent as to the counterclaims---the Court remanded the case to the trial court for entry of summary judgment against the plaintiff and determination of attorney fees.

Although we "prevailed," our remedies since remand in June 2002 have been 1) trial court proceedings that violated nearly every RPC, including ex parte communications and other violations documented in Attachment A; 2) dismissal without prejudice of our "right of appeal," filed before the hearing of July 26, 2002; 3) repeated threats of future SLAPPs and other actions by attorneys Newman and Gendler designed to prejudice and harm the former defendants and me; 4) repeated opposition by Right Price counsel, Matthew Sweeney, to award of ANY attorney fees to PCRCA and me; and 5) repeated sanctions by the Supreme Court and Pierce County Superior Court visting judge, Judge James Cayce, **against us** after we filed our claims with Pierce County and the State of Washington in December 2002.

Other "remedies" include harassment at Hospice during critical appeal periods, harm over four years to me and my family, harm to my health, constant uncertainty and

resultant constant stress, especially for the named individuals and me. Their jobs and relationships, too, have suffered great harm over the past four years. No one would assist us and the Washington Supreme Court's decision promises only years of the same because there is no "final decision."

I am attaching a sworn Declaration and incorporate by reference all documents I previously submitted to the courts. The briefs and arguments are strongly supported by the Rules, statutes and case law. Please review them to determine if they are frivolous." I firmly believe the constitutional principles are among the most important to citizens as a whole. Therefore, I request that the Bar take no further action on the grievance until the US Supreme Court makes its decision (the appeal was filed on August 26, 2003). Thank you for your patient consideration.

Sincerely,
s/ SHARON LEE GAIN
Sharon Lee Gain
WSBA 27972

(2)

No. 03-715

Supreme Court, U.S.
FILED
FEB 17 2004
OFFICE OF THE CLERK

In the

Supreme Court of the United States

Connells Prairie Community Council et al

Petitioners

v.

State of Washington et al

Respondents

To the Washington State Supreme Court
On Petition for Rehearing

PETITION FOR REHEARING

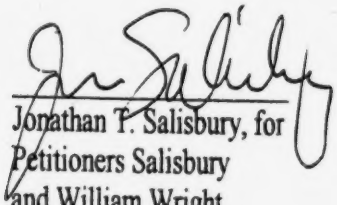
Jonathan T. Salisbury, Petitioner
P.O. Box 1316, Buckley, WA 98321
Phone: (253) 862-2073

William Wright, Petitioner
10414 230th Ave.Ct. E,
Buckley, WA 98321
Phone: (253) 862-4776

Certification per Rule 44

I, Jonathan T. Salisbury, petitioner in Supreme Court No. 03-715, certify that the Petitions for Rehearing and/ or Petition for Extraordinary Writ of Mandamus, is restricted to the grounds specified in Supreme Court Rule 44. The petition(s) are presented in good faith and not for delay.

Dated February 16, 2004
Respectfully,



Jonathan T. Salisbury, for
Petitioners Salisbury
and William Wright

ISSUE PRESENTED

1) Whether, based upon recent events and new or additional evidence, the Supreme Court should grant petitioners' rehearing on the Petition for Writ of Certiorari?

PARTIES TO THE PROCEEDING

Petitioners

The lead petitioner in this action is Sharon Gain, group member and attorney who represented the groups and their Presidents before the Washington Supreme Court. Petitioners also include individual defendants in the original action, Connells Prairie Community Council (CPCC) President Jonathan Salisbury and wife, Jane Doe Salisbury, Pierce County Rural Citizens Association (PCRCA) President William Wright, CPCC, PCRCA, John and Jane Does 1-10 for each group and Kenneth Gain, a total of 46 petitioners.

Respondents

Respondents are the plaintiffs in the original action, Right Price Recreation, LLC and Michael R. Mastro. Additional respondents for the counterclaims are 1) the officers and Justices of the Washington State Supreme Court, in their official capacities---Chief Justice Gerry Alexander, Justices Chambers, Owens, Bridge, Sanders, Ireland, Madsen, Johnson and Fairhurst, Commissioner Crooks, and Court Clerks Merritt and Carpenter 2) Washington State Court of Appeals, Division II's Judges in their official capacities---Judges Armstrong, Bridgewater and Houghton; 3) Pierce County, a political subdivision of the State of Washington, Pierce County Superior Court Judge Kitty-Ann van Doorninck, Pierce County Deputy Prosecutor Jill Guernsey and Pierce County Hearing Examiner Stephen Causseaux, in their official capacities; and 4) Right Price attorney Matthew Sweeney, former counsel of record for CPCC/ PCRCA, Shawn Newman, and CPCC attorney, Michael Gendler.

CORPORATE DISCLOSURE STATEMENT

Petitioner Connells Prairie Community Council (CPCC) is a nonprofit corporation whose members are homeowners and residents in the rural Bonney Lake and Lake Tapps area, Pierce County, Washington. There are no parent corporations or publicly held companies or stock. CPCC's funding is solely from member contributions. Members formed CPCC in 1995. CPCC remains an active nonprofit corporation on file with Washington's Secretary of State. Petitioner Jonathan Salisbury is CPCC's President.

Petitioner Pierce County Rural Citizens' Association (PCRCA) is a nonprofit corporation whose members are residents in the rural Bonney Lake and Buckley area of Pierce County, Washington. There are no parent corporations or publicly held companies or stock. PCRCA's funding is solely from member contributions. Members formed PCRCA on February 24, 1998. PCRCA remains an active nonprofit corporation on file with Washington's Secretary of State. Petitioner William Wright is PCRCA's President.

SUPREME COURT JURISDICTION

Petitioners filed timely Petitions for Extraordinary Writ and Certiorari on August 26, 2003. The Court denied the Petition for Writ of Certiorari on January 20, 2004. The Clerk returned the Extraordinary Writ for revisions, which we have not resubmitted. Although the Court has not issued a decision on the Extraordinary Writ, the Court retained petitioners' filing fee. Because the Rules state that the page limit is limited to ten pages, we respectfully request the Court consider the petitions as petitions for rehearing, or, in the alternative, a Petition for Extraordinary Writ of Mandamus. The Gain petition meets the Rule's page limitation of 30 pages.

The decisions are appealable under 28 USC 2104 and Article III § 2 of the U.S. Constitution because the case "arises under" the Constitution and federal constitutional rights. Although petitioners "prevailed" in the Washington Supreme Court decision of May 16, 2002, they have yet to obtain any remedy at law. Pet.App.15. Finally, the Court committed clear error when amended, rather than former, RCW 4.24.510 is the correct "law of the case."

To: The Supreme Court of the United States of America

Comes now, petitioners Connells Prairie Community Council (CPCC) President and former defendant, Jonathan Salisbury, and Pierce County Rural Citizens Association (PCRCA) President and former defendant, William Wright, request rehearing under rule 44 of order 03-715 declining review of our petition. This request is based upon substantial grounds not previously addressed and new information citied below.

1. **Petitioners respectfully request admission of the appendices, book and video as proffer submitted under separate cover.**

The appendices are the case and can not be arbitrarily severed. The book defines SLAPPs(strategic lawsuits against public participation). The video establishes redress of grievances before government as protected by the First Amendment.

2. **Petitioners respectfully request a Rehearing of order 03-715**

Free Speech is a God given Right, that no court can take away.

- We believe we were denied due process of our initial petition.
- The distinction between SLAPP's and torts requires judicial clarification to preserve Free Speech.
- Legal decisions of January 13, 2004 Washington State Court of Appeals Div.II and other jurisdictions have demonstrated an ongoing pattern of Bill of Rights abuse by the judiciary in Washington State.

Declaration of petitioner Jonathan Salisbury In support of the motion for Rehearing And admission of the appendices, book and video as proffer

My name is Jonathan T. Salisbury. I reside at 22908 Connells Prairie Rd. Buckley, Wa. 98321. I am over 18 years old and am competent to testify as a witness. I declare, under penalty of perjury, under the laws of the State of Washington, that this statement is true and correct to my best knowledge.

ABSENCE OF DUE PROCESS

Article III of the Constitution empowers the Court to decide all cases in law and equity arising under this Constitution. It is the Court's duty to protect all citizens' constitutional rights equally. We have been denied equal protection by means of economic discrimination, since we do not have millions of lobbying or campaign contribution dollars. Currently, the rights of the rich, or those big in business or politics, are granted superior rights to all others regarding Free Speech.

Significant unwanted alterations were made by clerks violating our XIV Amendment right of due process. Clearly, the Court can not make a decision if the pertinent information is presented piece meal by a system that shreds the case making it appear to be a crass grab for cash. It is clear abuse of due process to withhold the appendix of this petition from the justices, because that is the crux of this case. The pattern of consistent abuse of process in the court system can only be identified in the record as reviewed through the appendix.

The clerks changed the title of our case contrary to Washington State Law. Our due process rights were further injured when the clerks returned the extraordinary writ twice stating that there is no such thing in the US

Supreme court, however the rules clearly state that the Court must follow the law pursuant to the State where the case arose (RCW 7.14). Our appendix was returned twice stating that it did not meet rule requirements, which we extensively researched with the Court prior to submission both times. Furthermore, our motion to admit the appendix as proffer with a motion to expedite review was returned without comment. Justice O'Connor undoubtedly, never saw the motion as required by law. All of this illegal procedural wrangling has caused extensive additional financial, legal and emotional harm and extreme loss of faith in any constitutional protection.

SLAPPs DEFINED to AFIRM FREE SPEECH

For the honor of speaking before the Pierce County Council at a regularly scheduled meeting, on November, 4 1998, we were "SLAPPed" (strategic lawsuit against public participation) by a developer for slander, commercial disparagement, civil conspiracy and tortuous interference, while the Courts aided and abetted the perpetrators by continuing the sham of judicial propriety. Despite a unanimous decision by the Washington Supreme Court that we have done nothing wrong, we have yet to receive a final judgment or order.

The First Amendment has withstood 213 years and has remained strong. However, it is now being insidiously snuffed out by SLAPP suits disguised as Tort cases being filed for slander, liable, conspiracy and tortuous interference. One's First Amendment Rights are entirely ignored by the courts unless you have big money or the power of government behind your point of view. The Right to free speech is the most basic and essential component of a free society, without it no other law matters. Yet, the judiciary gangs up with business and government suppressing Free Speech.

If review is not granted to this case, millions of Americans, in all States, will have no first amendment rights whatsoever. By ignoring this petition the Court empowers government to wield the SLAPP knife to citizens' throats, holding them hostage. In our "techno" society information is power and external control of communication between the people and government is just plain extortion. As a result people are not apathetic about government, they are powerless and afraid to participate.

Immense additional harm has befallen our community, since we submitted our petition. We have been distracted and intimidated against participating in public processes regarding local land use issues until the SLAPP suit and pending First Amendment issues are fully resolved. The State Growth Management Act relies upon citizen involvement to blow the whistle on improper urban expansion into rural areas, since the act has no enforcement powers and no funding. The Mountain Creek and White River Estates projects are currently extending urban services in the form of sewers into rural areas in clear violation of the State GMA and recent Washington State Supreme Court rulings. We are powerless to prevent or challenge these blatant violations in light of the fact that the highest court in the land has stated by default that we no longer have a First Amendment Right to petition government with redress of grievances. Rejection of this petition automatically implies that citizens of this country no longer have a voice in governmental affairs. It is clear to the most casual citizen observer that if you attempt to participate in the public process, speaking out concerning vital governmental issues in order to protect your rights and ensure that government abides by it's own law you will be sued, thus chilling public debate.

If there is no validity to the First Amendment then what good is the Second Amendment or any word of government for that matter? What's next? Will people be sued for attending the "wrong" church or for not attending church at all, while the courts side with whoever has the most money or political clout? The logic is the same. The Constitution protects religious freedom as well.

CONTINUING PATTERN OF SLAPP SUITS

Another case in point of the never ending SLAPP suit from hell is the Washington State Court of Appeals Division II opinion of 01/13/04, docket number 27256-3-II in Loeffelholz v. CLEAN attached. This case has been ongoing since 1996, costing defendants thousands of dollars. Declining this petition puts us back in the SLAPP soup with no final judgment or order. The Washington Supreme Court mandate could be recalled by Right Price at any time sending us back to face a jury trial just as in the CLEAN SLAPP suit.

Despite the fact that the Washington State Legislature overwhelmingly passed a new anti-SLAPP law to protect citizen's first amendment rights the courts fail to recognize the new statute and continue to set bad precedent. In the Washington Court of Appeals decision of 01/13 case above the court wrongly concluded that there is no 1983 action allowed in a SLAPP case. This ruling further harms our future constitutional and civil rights by ignoring Federal law and precedent.

For all of the above new reasons we hereby request that the court reconsider its order 03-715 to decline review and accept this petition, because democracy and freedom so demand.

Jon Salisbury, President CPCC, Feb. 16, 2004
William Wright, President PCRCA, in agreement

EX.A

Court of Appeals Division II
State of Washington

Opinion Information Sheet

Docket Number: 27256-3-II
Title of Case: James Loeffelholz et al, Appellants v. Citizens for Leaders (CLEAN) etal, Resps./Cross-App.
File Date: 01/13/2004

SOURCE OF APPEAL

Appeal from Superior Court of Thurston County
Docket No: 99-2-00224-2
Judgment or order under review
Date filed: 03/30/2001

JUDGES

Authored by J Dean Morgan
Concurring: C C Bridgewater
David H Armstrong

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II
PUBLISHED OPINION

No. 27256-3-II

JAMES LOEFFELHOLZ,an individual; and PIERCE COUNTY,a government entity,

Appellants/Cross Respondents,

v.

CITIZENS FOR LEADERS WITH ETHICS AND ACCOUNTABILITY NOW (C.L.E.A.N.), a Washington non-profit corporation; TOM RICHESON and SUSAN COFFEY, a marital community; SHERRY BOCKWINKEL, a single person,

Respondents/ Cross Appellants.

MORGAN, P.J. - This case includes a counterclaim for violation of the Open Public Meetings Act (OPMA), as well as various other claims and counterclaims. It presents a plethora of issues. We affirm in part and reverse in part.

The events at issue occurred in the fall of 1996. They concern how the Pierce County Auditor was 'remaking' absentee ballots. Preliminarily then, we must understand the 'remaking' process.

Every county has a canvassing board composed of the county auditor or a designated deputy auditor, the county prosecutor or a designated deputy prosecutor, and the chair or a designated member of the county legislative body.1 After each election, the auditor convenes the board 'to process the absentee ballots and canvass the votes cast.'2 The meetings of the board are subject to Chapter 42.30 RCW, Washington's OPMA.3

When an absentee ballot is issued, it is accompanied by (1) 'a security envelope in which to seal the ballot after voting,' (2) 'a larger return envelope,' and (3) written instructions.4 Printed on the outsideof the larger return envelope is a declaration that the voter is qualified to vote.5 After reading the instructions, the voter marks the ballot and seals it inside the security envelope. The voter then seals the security envelope inside the larger envelope, signs the declaration on the outside of the larger envelope, and

returns the larger envelope to the auditor.

In 1996, absentee ballots were processed under former RCW 29.36.060.6. That statute provided:

The opening and subsequent processing of return envelopes for any primary or election may begin on or after the tenth day prior to such primary or election. The opening of the security envelopes and tabulation of absentee ballots shall not commence until after 8:00 o'clock p.m. on the day of the primary or election.

After opening the return envelopes, the county canvassing board shall place all of the ballot envelopes in containers that can be secured with numbered seals. These sealed containers shall be stored in a secure location until after 8:00 o'clock p.m. of the day of the primary or election. Absentee ballots that are to be tabulated on an electronic vote tallying system may be taken from the inner envelopes and all the normal procedural steps may be performed to prepare these ballots for tabulation before sealing the containers.

The canvassing board shall examine the postmark, statement, and signature on each return envelope containing the security envelope and absentee ballot. They shall verify that the voter's signature is the same as that in the registration files for that voter.

Former RCW 29.36.060 had at least three effects. First, it required the canvassing board to compare the signature on the exterior of each return envelope with the signature in the

voter's records, starting as early as ten days before the election. Second, it required the board to store each unopened security (inner) envelope in a secure container until after the polls closed except when the ballot was to be read and counted by an electronic voting machine, in which case the ballot could 'be taken from the inner envelope{} and all the normal procedural steps . . . performed to prepare {it} for tabulation before sealing the container{}.' Third, it required that absentee ballots not be tabulated until after the polls closed.

The second effect's exception insured that each absentee ballot would be machine-readable once the polls closed on election night. If the ballot was properly marked, nothing needed to be done. But if the ballot was improperly marked e.g., the voter had used red ink or circled a candidate's name it had to be 'remade' so it would be machine-readable.

In 1996, Pierce County generally used temporary election workers often retirees to 'remake' absentee ballots. These workers would identify those ballots that were not machine-readable. Functioning in teams of two, they would then transfer the votes on those ballots to new ballots that were machine-readable7 but only if the voter's intent was clear. If the voter's intent was not clear, they would refer the ballot to the canvassing board.

Before October 31, 1996, the Pierce County Auditor 'remade' ballots in a series of rooms known locally as 'Ballots R Us.' Located in the Pierce County Annex, these rooms had hallway

observation windows through which any member of the public could view the 'remaking' of ballots without entering,signing in, or obtaining a visitor pass.

By October 31, 1996, the Pierce County Auditor needed more space for 'remaking' due to a huge increase in absentee ballots. To accommodate this need, she directed that 'remaking' occur not just at 'Ballots R Us,' but also at the county's election warehouse. That warehouse was a half-mile from the Annex and did not have observation windows.

In the fall of 1996, Citizens for Leaders with Ethics and Accountability Now (CLEAN) was a nonpartisan organization. Its stated goal was 'to educate the citizens of Washington state about ethics and accountability of elected officials in order to return government to the people.'8 Sherry Bockwinkel was its vice-president, secretary, and one of its directors. Susan Coffey was one of its members.

On the morning of October 31, 1996, Bockwinkel and Coffey went to the elections warehouse. The door was locked and bore a sign saying, 'Knock Loudly.' As someone exited, they entered without knocking or otherwise obtaining permission.

Once inside, Bockwinkel and Coffey spoke with an election worker who said they should not be there without visitors' badges. They were asked to wait until a supervisor arrived. Instead of complying, they walked down a hallway, entered an area where about 30

workers were 'remaking' ballots,and began taking photographs.

At this point, Bockwinkel and Coffey were confronted by James Loeffelholz, a Pierce County deputy sheriff working overtime as a security guard. Loeffelholz asked them to leave, but they refused. A scuffle broke out as Loeffelholz, aided by an election worker named Billy Joe Arends, ejected them from the warehouse. When the scuffle ended, Bockwinkel and Coffey left.

The next day, Bockwinkel and Coffey complained to Sheriff's Lieutenant Mike Reed about Loeffelholz's '{u}se of force' and '{f}ailure . . . to stop {the} assault of Ms. Coffey by Mr. Arends{.}'9 The record does not show what else, if anything, was said.10 Reed commenced an internal affairs (IA)investigation, which was later closed with a finding of 'not sustained.'11

On November 2, 1996, Coffey's husband, Tom Richeson, wrote an article about the incident. He invited the reader 'to imagine being thrown up against a truck and choked up to the point where you can't breath{e} by a man more than twice your size and not knowing whether you're going to live through it.'12 He added:

> Even more frightening, an officer of the law stood watching. When {Coffey}tried to resist, Pierce County Sheriff James Loeffelholz stepped in and ordered {Coffey} to 'stop harassing' her attacker.. . . . Neither {Loeffelholz nor Arends} seemed to be afraid that any of the

> 30 or so people who were working there would contradict their official account of the incident, although it would be totally false.{13}

On November 4, 1996, Bockwinkel posted Richeson's article on CLEAN's website, where it was visited 175 times over the next two years. She also mailed it to 250 Pierce County Republicans and 1500 others statewide.

In December 1996 and April 1997, respectively, Bockwinkel and Coffey filed similar suits in the United States District Court for the Western District of Washington. Each named Loeffelholz as a defendant, and Coffey named Arends as an additional defendant.14 Each alleged that excessive force had been used and that her constitutional rights had been violated. Loeffelholz counterclaimed for malicious prosecution. The federal court consolidated the two suits, dismissed the constitutional-rights claims, refused jurisdiction over Loeffelholz's malicious-prosecution counterclaim,and declined to rule on issues of state election law.15 The federal court submitted the excessive force claims to a jury which, after two trials and one appeal to the Ninth Circuit, returned a verdict in favor of Loeffelholz with respect to all claims, and a verdict in favor of Coffey with respect to her claim against Arends. According to Loeffelholz and the County, Coffey's verdict was for '$2.'16

In July 1998, while the federal case was still on appeal to the Ninth

Circuit, Loeffelholz and Pierce County (hereafter 'the plaintiffs') sued CLEAN, Coffey, Richeson, and Bockwinkel (hereafter 'the defendants') in Thurston County Superior Court. Loeffelholz alleged that he had been defamed by the website article and by the internal affairs (IA) complaint. Both plaintiffs alleged they had been maliciously prosecuted in the federal case. In counterclaims for damages, the defendants alleged violations of 42 U.S.C. sec.1983, abuse of process, and negligence. In counterclaims against the County for reasonable attorney fees under RCW 42.30.120(2), CLEAN alleged violations of the OPMA.

In a counterclaim against both plaintiffs for reasonable attorney fees under RCW 4.24.510, the individual defendants alleged immunity from suit for defamation. We will refer to the defamation claims as 'the website claim' and 'the IA claim,' respectively.

During discovery, the superior court ordered the plaintiffs to disclose any internal affairs tape from which transcripts had been prepared. When the plaintiffs did not comply on time, the defendants moved for sanctions. The superior court declined to impose sanctions, finding no prejudice.

Both sides made motions to dismiss various claims before trial. The court granted motions to dismiss the plaintiffs' malicious prosecution claims and all of CLEAN's counterclaims except the one based on the OPMA. The court ordered that the plaintiffs' website and IA defamation claims be tried to a jury, but that CLEAN's OPMA counterclaim be tried to the bench.

The parties made motions in limine before trial, two of which are pertinent here. The plaintiffs moved to exclude mention of the Pierce County Auditor's having incorrectly described her education in previous litigation. The defendants moved to exclude mention of the federal judge's having commented, during the earlier federal case, that Bockwinkel and Coffey were trespassers. The superior court granted both motions.

On August 15, 2000, the superior court commenced a jury trial on both defamation claims. The only evidence concerning the IA defamation claim was the written IA report quoted above. Neither the tape nor the transcript was put before the jury. Lieutenant Reed did not testify. At the end of the plaintiffs' case in chief, the defendants moved to dismiss the IA claim, and the trial court granted the motion.

On August 25, 2000, the jury found for Loeffelholz on the website defamation claim. The verdict set damages at a total of $240,000 ($60,000 against each of the four defendants).

While the jury was deliberating on the website defamation claim, the court tried CLEAN's OPMA claim. It ruled 'that ballot processing at the warehouse was subject to the Open Public Meeting law;'17 that the County had violated that law; and that the County was liable for CLEAN's reasonable attorney fees and costs under RCW 42.30.120(2).

On August 29, 2000, the defendants moved for judgment notwithstanding the verdict or new trial on the website defamation claim. They claimed jury

misconduct, based on the declarations of four jurors.18 A representative juror stated:

> 1. I served on the jury in the above entitled case.
> 2. On Monday, November 13, 2000, I received a call from Shawn Newman, attorney for defendant CLEAN, inquiring about how the jury calculated damages.
> 3. I told Mr. Newman that the jury looked to a juror who worked as a realtor to estimate Mr. Loeffelholz's average salary.
> 4. As I recall, that juror came in with the number $250,000 and explained why that was an appropriate amount based on his age, expected work life and likelihood he would probably not be made a sergeant.
> 5. That juror stated he could figure out how much public servants earned and estimated Mr. Loeffelholz's average salary at $30,000.
> 6. Another juror suggested basing damages on the two years the case has been pending times his average salary.
> 7. They multiplied that average salary by the number of years the suit has been on-going (2) then by the number of defendants (4) to arrive at a total of $240,000.{19}

On October 20, 2000, the trial court partly granted and partly denied a new trial on Loeffelholz's website defamation claim. The court stated orally: 'I believe there was jury misconduct to bring extrinsic evidence

of salary in. I believe that the affidavits are enough that I have to grant a JNOV, and I do it reluctantly.'20 Accordingly, the court granted a new trial on the issue of damages, but not 'on the issues of liability.'21

On March 2, 2001, the trial court made two awards of costs and reasonable attorney fees. Based on RCW 42.30.120(2), it awarded CLEAN $50,000 in fees and $1,454 in costs. Based on RCW 4.24.510, it awarded Bockwinkel, Coffey, and Richeson a total of $50,000 in fees and $516 in costs. It declined to enter judgment until after the new trial was held.

In April 2001, the defendants appealed from the order granting a new trial. The plaintiffs cross-appealed, and the two sides now raise a host of issues.

I. The first two issues concern the website defamation claim. Loeffelholz argues that the trial court erred by setting aside the damages portion of the verdict. The defendants argue that the trial court erred by not setting aside the liability portion of that verdict.

A.Loeffelholz argues that the trial court was not permitted to set aside the damages verdict on his website defamation claim. He reasons that the information in the jurors' post-trial declarations 'inhered in the verdict'; that the court could not properly consider it; and that the court had no other basis for its ruling.

A jury verdict will not be set aside based on evidence that 'inheres in the verdict.'22 A jury verdict will be set aside based on evidence that is 'novel or extrinsic,'23 if such evidence affected the verdict.24 Evidence 'inheres in the verdict' to the extent that it discloses the thought process of a juror individually or of the jurors collectively.25 Evidence is 'novel or extrinsic' if it is wholly outside the evidence received at trial, and thus not subject to objection, cross examination, explanation, or rebuttal by either party.26 Thus, evidence 'inheres in the verdict' if it 'involves merely a more critical examination' of information produced in court, but not if it puts the jury 'in possession of material facts which should have been supported by evidence . . . which was not offered{.}'27

The trial court has discretion, the exercise of which we review only for abuse.28 In Halverson v. Anderson,29 the Washington Supreme Court applied these concepts to facts much like those here. A teenager sued for personal injuries suffered in an auto accident. At trial, the jury was asked to decide damages only. The evidence showed that before the accident the boy had wanted to become an airline pilot; that after the accident he had been rejected for a summer job in aviation due to his injuries; and that he presently was studying to be a civil surveyor. The evidence did not show the earnings of either a pilot or a surveyor, and thus the trial court refused to instruct on loss of earning capacity. During deliberations, nonetheless, one juror

told the others 'that a TWA pilot would earn $2,000 per month . . . and that a civil surveyor would earn $1,500 per month.'30 The jury returned a verdict for $20,000, which the defendant sought to vacate on grounds of jury misconduct. The trial court 'found that one of the jurors had . . . introduced evidence not presented by the parties at the trial, which the defendants had no opportunity to rebut and the relevance of which they had no chance to argue.'31 The trial court also found that such evidence had probably affected the verdict. Thus, the trial court granted an order for a new trial, which the plaintiff timely appealed. The Supreme Court affirmed, stating:

> Here, one juror stated to the other jurors certain matters of fact for which he vouched and which had not been introduced in the trial. His statement was an act capable of objective proof without probing the juror's mental processes. Any juror could testify to the fact of his making the statement, and another juror could deny that he made it, and it would then become a question of deciding which juror or jurors was worthy of belief.. . . .

We conclude that the superior court correctly determined that the juror who supplied the jury with information concerning the earnings of airline pilots and civil surveyors was guilty of misconduct in placing before his fellow jurors evidence which was not subject to objection, cross-examination,

explanation or rebuttal by the defendants.{32}

Notably, the Supreme Court did not distinguish between information from an extrinsic source e.g., a newspaper article33 or an attorney not involved in the case34 and information from the juror's own speculation.35

This case is like Halvorsen. The trial court did not give an instruction that the jury could consider loss of earning capacity when fixing damages; on the contrary,it told the jury to consider 'loss of reputation; shame; mortification; impairment of standing in the community; embarrassment; personal humiliation; injuries to feelings; and mental anguish and suffering.'36 During deliberations, a juror nonetheless placed before his fellow jurors salary and retirement information that was wholly outside the evidence and not subject to scrutiny by either party. The trial court did not abuse its discretion by deciding that this information did not inhere in the verdict; that the information affected the verdict; and that a new trial should be ordered on damages.

B. The defendants claim that the trial court was required to set aside the liability portion of the verdict on Loeffelholz's website defamation claim. According to them, the record shows, so clearly reasonable minds could not differ, that '{t}he newsletter article . . . was truthful'37 or involved opinion rather than fact; that even if the article was not truthful, it was not defamatory;38 that Loeffelholz 'suffered no damages'; that any damages he did

suffer were caused not by their article, but by 'some other publication';39 that their article was immune unless published with actual malice; and that their article 'is protected speech under the circumstances of this case{.}'40 In our view, however, each of these matters was one on which a rational trier of fact could find either way, and thus ultimately an issue for the jury to decide. Whether we review the record independently41 or only for substantial evidence,42 the evidence supports each element of defamation, plus actual malice, and the trial court was not required to set aside the liability portion of the website defamation verdict.

II. The next three issues concern the IA defamation claim. The plaintiffs claim that the trial court erred by dismissing it at the end of their case in chief. The defendants claim that evidence on the IA claim 'contaminated' the jury's consideration of the website claim. Both sides contend the trial court erred in calculating reasonable attorney fees under RCW 4.24.510.

A. The plaintiffs argue that the trial court erred by dismissing their IA defamation claim at the end of their case in chief. The defendants argue to the contrary. We do not find error for at least two reasons.

First, the proponent of a defamation claim must show that the statement complained of is false.43 In this case, however, the record shows only that Bockwinkel and Coffey told

Reed that Loeffelholz had (1) used force and (2) failed 'to stop {the} assault of Ms. Coffey by Mr. Arends{.}'44

The plaintiffs do not dispute that Loeffelholz used force against both Bockwinkel and Coffey.45 The plaintiffs do not dispute that Loeffelholz asked Arends to physically eject Coffey, or that Arends did that.46 Assuming without holding that Arends did not assault Coffey (the federal jury seems to have found that he did, at least in the sense of using excessive force), so that a contrary statement would have been false as to Arends, such a statement would not have been false as to Loeffelholz. The plaintiffs did not offer any other evidence for example, the tape that might have shown what Bockwinkel and Coffey said to Reed.47 We conclude that the plaintiffs failed to produce evidence sufficient to support a finding that either Bockwinkel or Coffey, while speaking with Reed, made a statement that was false as to Loeffelholz.

Second, the proponent of a defamation claim that falls under RCW 4.24.510 must show, 'by clear and convincing evidence, that the defendant knew of the falsity of the communications or acted with reckless disregard as to their falsity.'48 But if the evidence in this record is insufficient to support a finding that Bockwinkel or Coffey made a false statement as to Loeffelholz, as just discussed, it additionally and necessarily is insufficient to support a finding that Bockwinkel or Coffey 'knew of the falsity of the communications or acted with reckless disregard as to their falsity.'49 The trial court did

not err by dismissing the IA defamation claim at the end of the plaintiff's case in chief.

B. The defendants claim that the liability verdict on the website defamation claim was 'improperly influenced and completely contaminated' because the jury heard evidence on the IA defamation claim that was dismissed at the end of the plaintiffs' case in chief.50 Given that the dismissal of one claim does not automatically warrant the reversal of all other claims, their assertion can be true only if specific evidence that would not have been admissible on the IA defamation claim was improperly admitted on the website defamation claim. The defendants do not identify any such evidence, arguing only that 'after the principals . . . testified. . . . the jury {was} contaminated with the impression that filing the IA claim was wrong.'51 Nor do we perceive any such evidence, for virtually the entire stream of events, including the making of the IA complaint, had a tendency to prove or disprove malice, an essential element on the website defamation claim. The defendants have not shown that the IA claim 'contaminated' the jury's consideration of the website defamation claim.

C. Both sides contend that the trial court erred when it set reasonable attorney fees in favor of the individual defendants under RCW 4.24.510.

The plaintiffs claim that the trial court erred by not requiring the individual defendants to segregate their fees for the compensable IA claim from their fees for other claims, and thus that the trial court arbitrarily awarded fees in too high an amount. The defendants respond that the trial court erred by 'fail{ing} to describe on the record the method used in calculating the award{;}'52 by requiring them to segregate their fees; and by '{h}olding statutorily mandated attorney fees hostage until some potential future retrial{.}'53 The plaintiffs ask us to deny fees or remand for a redetermination of fees, while the defendants ask us to remand 'for {a} determination of full attorney fees as non severable.'54

1.Preliminarily, we must identify the claim or claims on which the trial court had discretion to award fees. A trial court may award reasonable attorney fees only if it has a statutory, contractual, or recognized equitable basis.55 Except for the OPMA, which we discuss elsewhere, the only such basis apparent here is RCW 4.24.510. In 1996, RCW 4.24.510 provided:

> A person who in good faith communicates a complaint or information to any agency of federal, state, or local government regarding any matter reasonably of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency. A person prevailing

> upon the defense provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense.{56}

This statute contains at least two requirements. The first is a claim based on the defendant's having 'communicate{d} a complaint or information to any agency . . . regarding any matter reasonably of concern to {that} agency.' The second is that the defendant prevail by establishing immunity.

The IA claim met both of these requirements; it was based on Bockwinkel's and Coffey's having communicated complaints to the sheriff's office, and it was a claim on which they prevailed by establishing immunity. In contrast, no other claim met both requirements, in part because no other claim involved a communication to an 'agency of federal, state, or local government.'57 We hold that Bockwinkel and Coffey are entitled to reasonable attorney fees incurred to establish immunity on the IA claim, but not to fees incurred to prosecute or defend the many other claims made here.

2. Having held that the trial court had discretion to award fees on only one of many claims and counterclaims, we turn to whether the trial court exercised its discretion properly. The attorney for the individual defendants initially requested $98,105.50, the total 'lodestar' amount incurred in defending the lawsuit.58 The trial court directed

him to segregate and reduce his request. He declined to do so, asserting that the court 'needs to award a full lodestar . . . as these two defamation claims are not segregable.'59 After the court again ordered him to segregate, he submitted a new request for $77,627.50. Finally, on March 2, 2001, the court orally ruled in part:

> I am not satisfied with the segregation. I have invited twice segregation to occur, but I have sat through this case, and I know that there was significant amount of preparation for the prevailing parties, which . . .the defendants Coffey, Buckwinkle {sic} . . . and Richeson are entitled to as a matter of law under the statutory scheme. In looking at the totality of this billing -- and it gets more and more segregated, but it is clearly not the segregation that the Court wanted. And in view of listening to the testimony, I find that I cannot piecemeal this, but I can state that I believe, in good faith, that there was some attorneys' fees expended to support their claims on which they won and they're entitled to. I will not go through item by item, and, if I am wrong, the court of appeals will tell me I am wrong and cannot do what I am about to do: I believe in the totality of the circumstances, without going inch by inch, because it has not been sufficiently segregated, although I wanted to, I will award to Defendants Coffey, Richeson and

> Buckwinkle {sic} a total of $50,000 in attorneys' fees.{60}

The court also declared that it would not enter a final judgment for fees until all claims had been resolved. On September 14, 2001, the trial court entered written findings of fact, one of which stated that '{t}he court is unable to segregate attorneys' fees.'61

We review for abuse of discretion.62 Abuse is shown 'when {the trial court's} decision is manifestly unreasonable or based upon untenable grounds{.}'63 The trial court must create an adequate record for review of fee award decisions,64 which means in part that the record must show a tenable basis for the award.

'If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.'65 This is true even if the claims overlap or are interrelated.66 An exception exists, however, if 'no reasonable segregation . . . can be made.'67 The burden of segregating, like the burden of showing reasonableness overall, rests on the one claiming such fees.68 The Supreme Court has summarized as follows:

> If, as in this case, an attorney fees recovery is authorized for only some of the claims, the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues. Gaglidari v.

Denny's Restaurants, Inc., 117 Wn.2d 426, 450, 815 P.2d 1362 (1991); Travis v. Washington Horse Breeders Ass'n, 111 Wn.2d 396, 410-11, 759 P.2d 418 (1988); Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 66, 738 P.2d 665 (1987); Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987); Fisher Properties, Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986); Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 859 P.2d 26 (1993).

{T}he court must separate the time spent on those theories essential to {the cause of action for which attorneys fees are properly awarded} and the time spent on legal theories relating to the other causes of action. . . . This must include, on the record, a segregation of the time allowed for the {separate} legal theories . . . .Travis, 111 Wn.2d at 411. Where, however, the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees. Pannell v. Food Servs. of Am., 61 Wn. App. 418, 447, 810 P.2d 952,815 P.2d 812 (1991), review denied, 118 Wn.2d 1008 (1992).{69}

In this case, the trial court clearly believed segregation was possible. After sitting through the lengthy and vexatious proceedings, it twice demanded information from which it would be able to segregate.

In this case, the trial court never found that segregation was not

reasonably possible. Noting that it had sat through the proceedings, and that it had twice demanded segregation, it orally commented that the IA claim 'has not been sufficiently segregated;' although the defendants' total billings were getting 'more and more segregated,' they still did not reflect 'the segregation that the Court wanted.'70 When it later found in writing that it 'was unable to segregate,' it was saying that the defendants had failed to furnish the necessary information, not that segregation was not reasonably possible.

In this case, segregation clearly was possible. The defamation claims were based on the events of November 1 and 2, 1996; the malicious prosecution claims on the federal proceeding commenced in December 1996 and April 1997; and the counterclaims on the state proceeding commenced in July 1998. At the core of each claim or type of claim was a different time and different facts, even though the facts overlapped in the sense that facts relevant on one were sometimes relevant to others as well. The record does not show that the claims were so interrelated as to excuse segregation. Nor will the record support a finding that $50,000 was reasonably incurred to establish a single defense (immunity) to a single claim (the IA defamation claim). This case embodied many claims and issues, and an award of nearly half the total fees incurred represents too high a proportion to be reasonable.

Based on these observations, we hold that the trial court was required to 'include, on the record, a

segregation of the time allowed for the {separate} legal theories.'71 It failed to do that, and thus abused its discretion. As a result, the award made here was arbitrary and not supported by the record. On remand, the trial court shall require the defendants to segregate (a) fees incurred to establish immunity on the IA defamation claim from (b) fees incurred on other claims and defenses. If the defendants fail or refuse to segregate, the trial court shall deny fees. If the defendants segregate in a way that the trial court finds partly but not wholly persuasive, the trial court may at its option 'independently decide what represents a reasonable amount of attorney fees' incurred to establish immunity on the IA defamation claim72 provided that it shows, on the record, a rational basis for its decision. Any award may include fees incurred on appeal, if any, to demonstrate immunity on the IA claim. We vacate the trial court's award of $50,000 in fees, with leave to redetermine that award on remand.

3. The defendants argue that the trial court was barred by law from '{h}olding statutorily mandated attorney fees hostage until some potential future retrial{.}'73 In other words, they contend that the court was required by law to enter an immediately enforceable judgment for fees before finally resolving the website defamation claim.

Subject to one exception pertinent here, a court generally must resolve all claims for and against all parties before it enters a final and enforceable judgment on any part of the case.74 The

goals are to avoid confusion and piecemeal appeals.75 For this reason, a final judgment is generally 'the final determination of the rights of the parties in the action{.}'76

The exception is found in CR 54(b). It provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. {Emphasis added.}

A trial court may utilize this exception only when the record will support the required findings.77 Even then, however, a trial court has broad discretion on whether to split the case by entering two or more final judgments that are likely to generate multiple appeals and premature enforcement activity.78

The trial court in this case did not abuse its discretion by ruling that final judgment should await the resolution of all claims for and against all parties. The defendants did not propose the findings required by CR 54(b). Even if they had, moreover, there were and are at least three clear reasons to delay the entry of any final judgment until all claims against all parties have been resolved: (1) to offset judgments favorable to each side before any enforcement activity takes place; (2) to preclude the disruptive effects of enforcement and appellate activity while trial court proceedings are still ongoing; and (3) to avoid a multiplicity of appeals. The trial court did not err by declining to enter a final judgment until all claims for and against all parties have been resolved, and on remand it will again have discretion to do that.

III. Loeffelholz and the County dispute the trial court's pre-trial summary dismissal of their claims for malicious prosecution. The elements of such a claim are (1) that the malicious prosecution defendants initiated or continued a principal action; (2) that the malicious prosecution defendants

acted without probable cause; (3) that the malicious prosecution defendants acted with malice; (4) that the principal action terminated in favor of the malicious prosecution plaintiff; and (5) that the principal action damaged the malicious prosecution plaintiff.79 When the principal action is civil, the malicious prosecution plaintiff is sometimes required to prove (6) 'special injury' and (7)'arrest of the person or seizure of property{.}'80 The malicious prosecution plaintiffs in this case are Loeffelholz and the County; the malicious prosecution defendants are Bockwinkel and Coffey; and the principal action was the civil one that Bockwinkel and Coffey pursued in
federal court.

At trial, the malicious prosecution claimant has the burden of proving each necessary element.81 But when a malicious prosecution defendant moves for summary judgment before trial, he or she 'bears the initial burden of showing the absence of an issue of material fact.'82 Only if he or she meets this burden is the non-moving party obligated to produce facts sufficient to show the presence of an issue of material fact.83 Accordingly, the first issue here is whether Bockwinkel and Coffey bore their initial burden of showing the absence of a material issue of fact with respect to the absence of probable cause or, when the double negatives are eliminated, whether Bockwinkel and Coffey showed as a matter of law (i.e., so clearly that reasonable minds could not differ) that they had probable cause to bring the federal case. If they did not show probable cause that clearly, its

presence or absence must be decided by a trier of fact.

Bockwinkel and Coffey assert that they had probable cause as a matter of law because the federal judge ruled that the evidence produced in federal court was sufficient to submit the federal case to the federal jury.84 In other words, as Loeffelholz and the County correctly point out, Bockwinkel and Coffey claim 'that their ability to get past summary judgment indicates they had probable cause to bring the claim.'85

The test for probable cause in Washington varies as between an informant and a probable-cause decision-maker.86 The test for an informant is the one involved here because Bockwinkel and Coffey supplied the information on which the federal suit was based. For an informant to have probable cause, he or she must have made to the probable-cause decision-maker 'a full and fair disclosure, in good faith, of all the material facts known to him {or her},' or, in alternative terms, he or she must have 'fully and truthfully communicate{d} to the {decision-maker} all the facts and circumstances within his {or her} knowledge{.}'87 'It does not matter whether the informant knows a lot or a little, so long as the informant 'fully and truthfully communicates' whatever it is that he or she honestly and in good faith believes.'88 But he or she 'can be liable if he or she lies or otherwise warps the truth in bad faith.'89

A judge does not consider or apply this test when he or she rules that the evidence produced at trial is sufficient to take the case to the jury. The test

for sufficiency is whether a rational trier of fact could find not whether the trier should or would find the fact contended for by the non-moving party.90 When applying that test, the judge must take the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party.91 This is the same as to say that the judge must assume, not assess, the credibility of witnesses who favor the non-moving party.

When the federal judge ruled in the federal case at issue here, he determined that the federal jury could find that excessive force had been used. He did not rule that the jury should or would find that such force had been used, or that he himself believed such force had been used. In the absence of such findings, neither he nor the federal jury determined that Bockwinkel and Coffey had probable cause to bring the federal case because they had truthfully communicated the material facts known to them.

The situation might be different if the federal jury had found for Bockwinkel and Coffey,92 but it did not. The key issue with respect to probable cause was whether Bockwinkel and Coffey were telling the truth in good faith or lying in bad faith in the federal action;93 that issue was not addressed when the federal judge found the evidence sufficient to go to the jury in the federal case; and Bockwinkel and Coffey have not borne their initial burden of showing probable cause as a matter of law. In more formal but confusing terms, Bockwinkel and Coffey have not shown the absence of a material

issue of fact on the lack of probable cause merely because the federal judge submitted the federal case to the federal jury.94

IV. The defendants claim that the trial court erred by dismissing counterclaims in which they alleged violations of 42 U.S.C. sec. 1983 and abuse of process.95 With respect to sec. 1983, the defendants claim violations of 'their First Amendment rights to petition the government for redress, freedom of speech and freedom of the press{,}'96 merely because the plaintiffs sued for defamation. They do not cite any authority for the proposition that a party violates sec. 1983 merely by suing for defamation,97, and we know of none. Moreover, the United States Supreme Court has held that a party does not offend First Amendment rights by suing a public figure for defamation if, as here, he or she is required to prove actual malice.98 The trial court did not err by dismissing the sec. 1983 counterclaim.

With respect to abuse of process, the defendants claim that the evidence is sufficient to support findings on each essential element of the tort. But the 'mere institution of a legal proceeding even with a malicious motive does not constitute an abuse of process.'99 Instead, '{t}he gist of the action is the misuse or misapplication of the process, after it has once been issued, for an end other than that which it was designed to accomplish.'100 In other words, the action requires 'a form of extortion, and it is what is done in the course of negotiation, rather than

the issuance or any formal use of the process itself, which constitutes the tort.'101 Although the evidence here shows 'the mere institution of a legal proceeding,' it shows nothing about process having been abused 'after it has once been issued.' The trial court did not err by dismissing this counterclaim.

V. The next issue is whether the trial court erred by awarding costs and reasonable attorney fees to CLEAN under RCW 42.30.120(2). That statute is part of the Open Public Meetings Act (OPMA), Chapter 42.30 RCW. It provides,

> 'Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.'

To analyze whether fees can be claimed under the OPMA, we address three questions. (A) When does it apply? (B) When it applies, what does it require? (C) When it applies but its requirements are not met, what consequences follow? We then apply the results to this case.

A. The OPMA applies only if several criteria are met. First, a 'public agency' must be involved.102 Examples include a state board or other state agency created by statute (other than the courts and the legislature); a county, city, or other political subdivision of the state; and any

subagency' created by statute, ordinance, or other legislative act.103

Second, the public agency must be governed by a multimember board, commission, or similar body.104 If the agency is governed by an individual,the OPMA does not apply.105

Third, the agency's governing body, or a committee thereof, must hold a 'meeting' at which the body or committee has the ability to 'transact official business.'106 If the body or committee lacks a quorum, the OPMA does not apply.107

Fourth, the agency's governing body, or a committee thereof, must hold a meeting at which it actually 'transacts official business.'108 If it holds a meeting without transacting such business, the OPMA does not apply.109

B. When the OPMA applies, it requires that '{a}ll meetings of the governing body of a public agency . . . be open and public and all persons . . . be permitted to attend . . . , except as otherwise provided in this chapter.'110 The governing body may not adopt 'any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter.'111 And, anyone may attend such meeting without being required 'to register his name and other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his attendance.'112

C. When the OPMA applies but its requirements are not met, several consequences may ensue. A claimant may recover a civil penalty of $100 against each member of the agency's governing body who knew the meeting was being held in violation of the OPMA.113 A claimant who prevails against the agency may recover reasonable attorney fees and costs.114 The 'action' taken at the 'meeting' may be 'null and void,'115 and a continuing or threatened violation may be enjoined.116

D. In this case, the election workers were not the 'governing body' of a 'public agency.' They were not organized, by statute or any other provision of law, into either a 'public agency' or a 'governing body.' As a matter of law, they could not have held a 'meeting' to which the OPMA applied.

In this case, the Pierce County Auditor's Office was a public agency that lacked a 'governing body' of the type described in the OPMA. It was controlled by a single individual, the independently elected auditor, and not by a 'multimember board, commission, committee,' or the like.117 Thus, it could not have held a 'meeting' to which the OPMA applied.

In this case, the county canvassing board was a 'public agency' that had a 'governing body.' But even when viewed in the light most favorable to CLEAN, the record does not show that a majority of the board's members ever met, or, if they met, that they ever took 'action'

(i.e., transacted official business). Nor does the record show that the board ever divided itself into committees, that one of its committees ever 'met,' or that any such committee ever took 'action.' The record is factually insufficient to support a finding that the canvassing board's 'governing body,' or a committee thereof, held a 'meeting' to which the OPMA applied; and without such a finding, the OPMA does not apply.

Emphasizing the canvassing board's authority to delegate most tasks,118 CLEAN asserts, in effect, that the canvassing board delegated to seasonal election workers its authority not just to 'remake' ballots when the voter's intent was clear, but also its authority to convene and hold 'meetings' within the meaning of the OPMA. CLEAN then asserts or assumes that the election workers held 'meetings' to which the OPMA applies.

We reject these assertions. Even assuming that the required majority of such workers somehow 'met' an assumption wholly without foundation in the record their 'meeting' could not be subject to the OPMA unless it was the 'meeting' of the 'governing body' of a 'public agency;'119 they could not be a 'governing body' unless they had policy-making or rule-making authority;120 and nothing in the record shows that they had policy-making or rule-making authority. Accordingly, CLEAN cannot rely on the OPMA in this case.

Before ending this part of our discussion, we caution that nothing herein means that the process of 'remaking' absentee ballots need not be public.121 We hold only that the

'governing board' of a 'public agency' did not hold a 'meeting;' that in the absence of such a 'meeting' the OPMA does not apply; and that because the OPMA does not apply, the trial court erred by awarding fees and costs under RCW 42.30.120(2).

VI. The defendants raise several additional issues. They argue that the trial court erred (A) by declining to impose sanctions for discovery violations and alleged misconduct by plaintiffs' counsel; (B) by excluding any mention of the Auditor's history of false swearing; C) by not telling the jury that the IA claim had been dismissed; and (D) by not granting post-verdict relief for several remarks made by plaintiffs' counsel during closing argument.

A. The defendants complain about the trial court's denial of their motions to impose sanctions for discovery violations. They argue that the County did not produce, or produced tardily, (1) Loeffelholz's personnel file; (2) a tape of Bockwinkel and Coffey's conversation with Lt. Reed on November 1, 1996 (hereafter 'the IA tape'); and (3) a tape of Lt. Bisson's later investigatory interview of Loeffelholz (hereafter the Bisson-Loeffelholz tape).122

A trial court has discretion when asked to impose sanctions for discovery violations. We review only for abuse of that discretion.123 Thus,the issue here is whether the trial court abused its

discretion by not imposing sanctions; or, put another way, whether the trial court was not just permitted, but also required, to impose sanctions.

The trial court was not required to impose sanctions for the County's concededly late production of the personnel file. The County produced the entire file just before trial, and no one admitted the file during trial. The trial court found, and the record supports, that the defendants were not prejudiced. The trial court had discretion either to grant or deny sanctions, and it did not abuse its discretion by denying them.

The trial court was not required to impose sanctions for the County's concededly late production of the IA tape.124 On April 30, 1997, Bockwinkel testified in a deposition that she and Coffey had a copy of the IA tape,which she, Bockwinkel, had 'listened to.'125 Early on, as far as we can tell, both sides had a transcript of the tape. By August 14, 2000, it was clear that even though the tape was not available, the transcript was. On August 17, 2000, the trial court ruled that the transcript could be used before the jury. On August 21, 2000, the County finally found and disclosed the tape. Several days of trial remained, but no one neither the defendants nor the plaintiffs ever elected to use either the tape or the transcript in front of the jury. The tape was most relevant, though not exclusively so, to the IA claim that was finally dismissed on other grounds. The trial court found, and the record supports, that the County acted in good faith notwithstanding its

tardiness, and that the defendants were not prejudiced.126 The trial court had discretion either to grant or deny sanctions, and it did not abuse its discretion by denying them.

The trial court was not required to impose sanctions for the County's non-production of the Bisson-Loeffelholz tape. The record shows that the County disclosed a transcript of that tape early on; that the defendants used that transcript to impeach Loeffelholz;127 and thus that the defendants were not prejudiced by the absence of the tape itself. The defendants first noted the absence of this tape after the verdict. The trial court found that the County acted in good faith despite its tardiness. The trial court had discretion either to grant or deny sanctions, and it did not abuse its discretion by denying them.128

B. The defendants argue that the trial court erred by 'excluding any mention of the Auditor's history of false swearing.'129 They assert that '{u}nder ER 609(a)(2), evidence of crimes involving dishonesty or false statement must be admitted when offered; the trial judge has no discretion.'130

The defendants mistake the applicable rule. ER 608(b) provides in part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in

> Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness . . .

ER 609(a)(2) provides in part:

> For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted . . . if the crime . . . involved dishonesty or false statement, regardless of the punishment. ER 608 applies when non-conviction evidence is offered to attack a witness' character for truthfulness, while ER 609 applies when conviction evidence is offered to attack a witness' character for truthfulness.

In this case, the defendants never offered to prove that the Auditor had been convicted for perjury or false swearing. Rather, they offered to prove two specific instances of non-convicted conduct that the Auditor had falsely represented her education in a voter's pamphlet, and that the Auditor had falsely testified about her education in an unrelated case.131

The applicable rule was ER 608(b), not ER 609(a)(2); the trial court had broad discretion to admit or exclude the specific instances of non-convicted conduct that the defendants were

offering; and the trial court did not abuse its discretion by excluding those specific instances.

C. The defendants complain in two ways about how the trial court told the jury that the IA claim had been dismissed. The court erred, they assert,(1) by failing to instruct the jury that the IA claim had been dismissed,and (2) by prohibiting their counsel from informing the jury during his closing argument that the IA claim had been dismissed.

The first argument fails because the defendants did not propose an instruction that would have told the jury that the IA claim had been dismissed. Nor did they object when the court actually instructed, '{T}here are some issues that the court considered. You have the remaining issues.'132 For both reasons, the first argument has not been preserved for review.

The second argument fails for lack of merit. Counsel had a right to comment on the issues that the jury was to decide. He did not necessarily have a right to comment on issues that the jury was not to decide. If the trial court had allowed him to comment on issues the jury was not to decide, it would have generated a real and substantial danger that closing arguments would run amok, given the obviously vexatious nature of the case. The trial court did not abuse its discretion by limiting closing arguments as it did.

D. The defendants make several additional complaints about the closing arguments. They argue that the County's counsel should not have been allowed to refer (1) to the IA complaint that Bockwinkel and Coffey had made to Reed; (2) to the IA tape; or (3) to Bockwinkel and Coffey as 'trespassers.'

Preliminarily, none of these alleged errors was preserved for review, for none was the subject of a timely objection. The same result follows, however, if we briefly consider other grounds.

Error did not occur when the County's counsel referred to the IA complaint. Counsel was arguing malice133 and credibility,134 both being relevant matters then before the jury. Defense counsel argued similarly.135

Error did not occur or was invited when the County's counsel, in his rebuttal closing argument, referred to the IA tape that was never put before the jury by either side. The County's counsel was responding to defense counsel, who had just told the jury:

> They went and they told I.A., they told the sheriff's department that this had happened. They tried to file an assault charge against Billy Joe Arends and they wouldn't let them. But they took their statements, which plaintiff did not let you hear. They didn't bring those statements in.{136}

In rebuttal, the plaintiffs' counsel responded:

> They've got the tape. If it was such hot stuff for them, why didn't they bring it? We don't have to because we've got the written document that says what their complaint was. We've got the documents from the officers and the people that handled it, to show you that these people didn't cooperate at all with this Internal Affairs investigation, if they really wanted to bring it. They didn't. They just wanted to cause trouble for Officer Loeffelholz.{137}

By plainly referring to the IA tape, defense counsel 'opened the door' on that subject and gave the county a right to argue its side of the same issue. That the county responded within these parameters is manifested by defense counsel's failure to object at the time. There was no error or, if error be assumed, it was invited (i.e., the door had been opened).

Error did not occur or was harmless when the County's counsel referred to Bockwinkel and Coffey as trespassers. As the defendants correctly emphasize, the trial court earlier had precluded counsel from mentioning, during their closing arguments, a federal judge's opinion, uttered during the federal suit, that the two women were trespassers in the warehouse.

But the parties also had stipulated to the admission of Exhibit 134, in which Lt. Bisson had 'conclude{d} that Ms. Coffey and Ms. Bockwinkel did violate RCW 9A.52.070 Criminal Trespass 1 by entering and remaining on the premises of a secured facility without

the proper authorization and refusing to leave when ordered to do so by . . . Loeffelholz.'138 Pursuant to their stipulation, this exhibit was admitted and went to the jury room during deliberations. The reference now complained of added nothing to what the jury already had, it could not have affected the verdict, and it was harmless under these circumstances.

Any arguments or assertions not herein discussed lack merit or need not be reached.

The trial court's orders on the website defamation claim are affirmed, and the damages portion of that claim is remanded for new trial. The trial court's dismissal of the malicious prosecution claims is reversed, and those claims are remanded for further proceedings. The trial court's order granting fees and costs under RCW 43.30.120(2) is reversed. The trial court's order granting fees and costs under RCW 4.24.510 is reversed and remanded for redetermination (including such fees and costs incurred on this appeal), provided that the record developed on remand discloses a rational basis for segregating fees and costs reasonably incurred on the IA claim from fees and costs incurred on other claims. In all other respects,the trial court's judgment is affirmed.

Morgan, P.J.

We concur:

Bridgewater, J.

Armstrong, J.

1 RCW 29.62.015(1).
2 Former RCW 29.62.020(1); Laws of 1995, ch. 139, sec. 2.
3 RCW 29.62.015(4).
4 Former RCW 29.36.045; Laws of 1987, ch. 346, sec. 12. Currently codified as RCW 29.36.290. See also former WAC 434-40-190 (1988), currently codified as WAC 434-240-190.
5 Former RCW 29.36.045; Laws of 1987, ch. 346, sec. 12. Currently codified as RCW 29.36.290.
6 Laws of 1991, ch. 81, sec. 32. This former statute is presently codified in substance as RCW 29.62.310(3). See also former WAC 434-40-230, former WAC 434-40-240 (1988), present WAC 434-240-230, and present WAC 434-240-240.
7 One worker would read the votes aloud, and the other worker would mark them on a new ballot that could be machine-read.
8 Clerk's Papers (CP) at 45 (underlining omitted).
9 CP at 515.
10 Someone taped this conversation, although the record does not show who. In a deposition taken April 30, 1997 and published August 21, 2000, Bockwinkel testified that she and Coffey had 'our own copies' of the tape and that she had reviewed hers. CP at 3412. On August 16, 2000, at a time when the County was asserting the tape had been lost, the trial court ruled that a transcript of it could be put before the jury. On August 21, 2000, the County belatedly produced the tape itself. The trial ran two or three more days, but neither party elected to put the tape or transcript before the jury.
11 Exhibit (Ex.) 134; Ex. 142.
12 CP at 395-96; Ex. 17.

13 CP at 396-97; Ex. 17.
14 Bockwinkel also sued Pierce County and its Auditor, but they were later dismissed.
15 The federal court stated in a written opinion that it would not 'litigate the legality of the balloting procedures of the Pierce County Auditor. Those procedures are matters of state law and are not before the court in this lawsuit.' CP at 1024.
16 Br. of Appellant at 15.
17 CP at 2647.
18 The defendants also submitted two hearsay declarations from CLEAN's counsel, the content of which was substantially similar.
19 CP at 2532; see also CP at 2118-19, 2531.
20 CP at 2482.
21 CP at 2445.
22 Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003); Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962); Richards v. Overlake Hosp. Medical Ctr., 59 Wn. App. 266, 272, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014 (1991).
23 State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994); State v. Gobin, 73 Wn.2d 206, 211-12, 437 P.2d 389 (1968); Richards, 59 Wn. App. at 270.
24 Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 137, 750 P.2d 1257 (1988); Richards, 59 Wn. App. at 271-72; State v. Briggs, 55 Wn. App. 44, 55-56,60, 776 P.2d 1347 (1989); Fritsch v. J.J. Newberry's, Inc., 43 Wn. App. 904, 907, 720 P.2d 845, review denied, 107 Wn.2d 1006 (1986).

25 State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988); Richards, 59 Wn. App.at 272.
26 Balisok, 123 Wn.2d at 118; Adkins, 110 Wn.2d at 137; Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973); State v. Everson, 166 Wash. 534, 536-37, 7 P.2d 603 (1932); Richards, 59 Wn. App. at 270-71 (quoting Lockwood v. AC & S, Inc., 44 Wn. App. 330, 357-58, 722 P.2d 826 (1986), aff'd, 109 Wn.2d 235 (1987)); Fritsch, 43 Wn. App. at 907.
27 Balisok, 123 Wn.2d at 119 (quoting Everson, 166 Wash. at 536-37).
28 Breckenridge, 150 Wn.2d at 203 (citing Balisok, 123 Wn.2d at 117, and Halverson, 82 Wn.2d at 752).
29 82 Wn.2d 746, 513 P.2d 827 (1973).
30 82 Wn.2d at 747.
31 82 Wn.2d at 748.
32 82 Wn.2d at 751-52.
33 See State v. Rinkes, 70 Wn.2d 854, 859-63, 425 P.2d 658 (1967).
34 See Fritsch, 43 Wn. App. at 906.
35 Absent Halverson, we would have thought that a juror's remark during deliberations would inhere in the verdict unless shown to be based on an external source such as a newspaper article (e.g., Rinkes, 70 Wn.2d at 859-63) or the statement of an attorney not involved in the case (e.g.,Fritsch, 43 Wn. App. at 906). See Gardner, 60 Wn.2d at 841 (verdict cannot be affected 'by an improper remark of a fellow juror') (quoting 8 Wigmore on Evidence sec. 2349 (McNaughton Rev. 1961)) (footnotes omitted). Halverson, however, seems to have modified Gardner in cases in which a juror injects unsupported information concerning the claimant's loss of earning capacity. The Supreme Court

cited Halverson, apparently with approval, in its recent case of Breckenridge v. Valley General Hospital,150 Wn.2d 197, 203, 75 P.3d 944 (2003).

36 CP at 2075.

37 Br. of Resp't at 65.

38 We think that this is what the defendants mean when they note that '{a} false statement will not support a defamation action unless it is apparent that the false statement presents a substantial danger to the plaintiff's personal or business reputation.' Br. of Resp't at 68.

39 Br. of Resp't at 67.

40 Br. of Resp't at 68.

41 See Richmond v. Thompson, 130 Wn.2d 368, 388-89, 922 P.2d 1343 (1996); Ernst Home Ctr., Inc. v. United Food and Commercial Workers Int'l Union, AFL-CIO, Local 1001, 77 Wn. App. 33, 44, 888 P.2d 1196 (1995) (citing Swartz v. World Publ'g Co., 57 Wn.2d 213, 215, 356 P.2d 97 (1960) and Purvis v. Bremer's, Inc., 54 Wn.2d 743, 753, 344 P.2d 705 (1959)). See also Wood v. Battle Ground Sch. Dist., 107 Wn. App. 550, 572, 27 P.3d 1208(2001) ('The court must decide whether the statement is capable of a defamatory meaning and the jury decides whether the statement was, in fact,defamatory.').

42 See Caruso v. Local Union No. 690, 107 Wn.2d 524, 530, 730 P.2d 1299, cert. denied, 484 U.S. 815 (1987); Mark v. Seattle Times, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124 (1982); Wood, 107 Wn. App. at 573; Moe v. Wise, 97 Wn. App. 950, 957, 989 P.2d 1148 (1999), review denied, 140 Wn.2d 1025 (2002). 43

Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767,775-76, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986); Herron v. KING Broad. Co,112 Wn.2d 762, 768-69, 776 P.2d 98 (1989); Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 590-91, 943 P.2d 350 (1997), review denied, 134 Wn.2d 1013 (1998).

44 CP at 515.

45 E.g., CP at 955, where Loeffelholz reports, 'I began to push Coffey and Bockwinkle {sic} down the hallway towards the door{,}' and CP at 956, where Loeffelholz reports, 'I was able to force Bockwinkle {sic} out the door.'

46 E.g., CP at 956, where Loeffelholz reports that he asked Arends to 'help me get these people out of the building{;}' that he told Arends 'to take Coffey, open the door and get her outside{;}' and that Arends 'did this.'

47 Someone taped this conversation, although the record does not show who. Neither party put the tape or its contents before the jury.

48 Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 383, 46 P.3d 789 (2002) (quoting Gilman v. McDonald, 74 Wn. App. 733, 739, 875 P.2d 697, review denied, 125 Wn.2d 1010 (1994)).

49 Right-Price Recreation, 146 Wn.2d at 383 (quoting Gilman, 74 Wn. App. at739).

50 Br. of Resp't at 74.

51 Reply Br. of Resp't at 9 (underlining omitted). See Right-Price Recreation, 146 Wn.2d at 384 (plaintiff did not establish prima facie case of defamation

where '{it} did not identify any alleged defamatory statements').
52 Br. of Resp't at 76.
53 Br. of Resp't at 77.
54 Br. of Resp't at 79.
55 McGreevy v. Oregon Mut. Ins. Co., 128 Wn.2d 26, 35, 904 P.2d 731 (1995).
56 Former RCW 4.24.510 (1989); Laws of 1989, ch. 234, sec. 2 (emphasis added). The statute was amended in 1999 and 2002.
57 If the defendants are contending that the website defamation claim involved communications to an agency of government, we reject that position. It involved communications to various individuals, none of whom was a government agency.
58 CP at 2554.
59 CP at 2552.
60 Report of Proceedings (RP) (Mar. 2, 2001) at 16-17 (emphasis added).
61 CP at 174.
62 Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 65, 738 P.2d 665 (1987); Mayer v. City of Seattle, 102 Wn. App. 66, 79, 10 P.3d 408 (2000), review denied, 142 Wn.2d 1029 (2001).
63 Allard v. First Interstate Bank of Washington, N.A., 112 Wn.2d 145, 148-49, 768 P.2d 998 (1989); Mayer, 102 Wn. App. at 79.
64 Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998); Mayer, 102 Wn.App. at 79.
65 Mayer, 102 Wn. App. at 79-80; Smith v. Behr Process Corp., 113 Wn. App. 306, 344, 54 P.3d 665 (2002); Dash Point Village Assocs. v. Exxon Corp., 86 Wn. App. 596, 611, 937 P.2d 1148 (1997).
66 Travis v. Washington Horse Breeders Ass'n, Inc., 111 Wn.2d 396, 411, 759

P.2d 418 (1988); Fisher Properties, Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 850, 726 P.2d 8 (1986); Behr Process, 113 Wn. App. at 344-45.
67 Mayer, 102 Wn. App. at 80 (quoting Hume v. Am. Disposal Co., 124 Wn.2d 656, 673, 880 P.2d 988 (1994), cert. denied, 513 U.S. 1112 (1995)).
68 Kastanis v. Educ. Employees Credit Union, 122 Wn.2d 483, 501-02, 859 P.2d 26 (1993) ('plaintiff can be required to segregate its attorney's fees between successful and unsuccessful claims'); Schmidt v. Cornerstone Invest., Inc., 115 Wn.2d 148, 171, 795 P.2d 1143 (1990) (fees denied because 'the attorney fee declaration . . . does not segregate'); Reninger v. Dept. of Corrections, 79 Wn. App. 623, 640, 901 P.2d 325 (no fees where claimants failed to segregate), aff'd, 134 Wn.2d 437 (1995); Malarkey Asphalt Co. v. Wyborney, 62 Wn. App. 495, 514-15,814 P.2d 1219 (1991)defendants 'shall segregate the time dedicated to the legal theories for which fees are allowed').
69 Hume, 124 Wn.2d at 672-73 (emphasis added).
70 RP (Mar. 2, 2001) at 16-17.
71 Hume, 124 Wn.2d at 673 (quoting Travis, 111 Wn.2d at 411).
72 Mayer, 102 Wn. App. at 79.
73 Br. of Resp't at 77.
74 Kemmer v. Kieski, 116 Wn. App. 924, 932, 68 P.3d 1138 (2003); State v.Trask, 91 Wn. App. 253, 265, 957 P.2d 781 (1998), review denied, 137 Wn.2d 1020 (1999); Matson v. City of Tacoma Civil Service Bd., 75 Wn. App. 370,377, 880 P.2d 43 (1994).
75 See In re Dependency of E.L.F., 117 Wn. App. 241, 244, 70 P.3d 163 (2003);

Burton v. Clark County, 91 Wn. App. 505, 513-14 n. 9, 958 P.2d 343 (1998), review denied, 137 Wn.2d 1015 (1999).

76 CR 54(a)(1).

77 Fox v. Sunmaster Products, Inc., 115 Wn.2d 498, 502, 798 P.2d 808 (1990); Doerflinger v. New York Life Ins. Co., 88 Wn.2d 878, 880, 567 P.2d 230 (1977); Nelbro Packing Co. v. Baypack Fisheries, L.L.C., 101 Wn. App. 517, 522-23, 6 P.3d 22 (2000); Pepper v. King County, 61 Wn. App. 339, 345, 810 P.2d 527 (1991).

78 Schiffman v. Hanson Excavating Co., Inc., 82 Wn.2d 681, 687, 513 P.2d 29 (1973); Lindsay Credit Corp. v. Skarperud, 33 Wn. App. 766, 772, 657 P.2d 804 (1983).

79 Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 497, 125 P.2d 681 (1942); see also Hanson v. City of Snohomish, 121 Wn.2d 552, 558, 852 P.2d 295 (1993); Bender v. City of Seattle, 99 Wn.2d 582, 593, 664 P.2d 492 (1983); Gem Trading Co., Inc. v. Cudahy Corp., 92 Wn.2d 956, 962-63, 603 P.2d 828 (1979); Hanson v. Estell, 100 Wn. App. 281, 286, 997 P.2d 426 (2000); Brin v. Stutzman, 89 Wn. App. 809, 818, 951 P.2d 291, review denied, 136 Wn.2d 1004 (1998); Pay ' N Save Corp. v. Eads, 53 Wn. App. 443,447, 767 P.2d 592 (1989); 16A David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law And Practice, sec. 21.2, at 45 (2d ed. 2000); Clark v.Baines, 114 Wn. App. 19, 30-55, 55 P.3d 1180 (2002) (Morgan, J., concurring and dissenting in part), review granted, 149 Wn.2d 1009 (2003).

80 Gem Trading, 92 Wn.2d at 963; see also Petrich v. McDonald, 44 Wn.2d 211,216, 266 P.2d 1047 (1954); Manhattan Quality Clothes v. Cable, 154 Wash.654,

657, 283 P. 460 (1929); Abbott v. Thorne, 34 Wash. 692, 694, 76 P. 302(1904); Baines, 114 Wn. App. at 30-55 (Morgan, J., concurring and dissenting in part). But see RCW 4.24.350 (excusing these elements in some cases).

81 Peasley, 13 Wn.2d at 498; see Bender, 99 Wn.2d at 593; Baines, 114 Wn.App. at 30-55 (Morgan, J., concurring and dissenting in part).

82 Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989), review denied, 118 Wn.2d 1023 (1992).

83 Young, 112 Wn.2d at 225.

84 Quoting the federal judge's decision on sufficiency, they argue:

> The federal suit was supported by probable cause and attempts to dismiss Loeffelholz from the suit failed. The court let the excessive force issue concerning both Loeffelholz and Arends proceed to trial.

The court has reviewed the evidence presented by {Bockwinkel and Coffey}.Although {Loeffelholz and Arends} state that they did not use excessive force, {Bockwinkel and Coffey} have presented sufficient evidence supporting their claims. A jury is required to resolve the differing versions of the truth . . . The defendants' motion for summary judgment on this issue should be denied. Br. of Resp't at 47-48 (quoting CP at 1025) (emphasis added in Br. Of Resp't).

85 Reply Br. of Appellants at 3.

86 Baines, 114 Wn. App. at 40, 46-47 (Morgan, J., concurring and dissenting in part).

87 Peasley, 13 Wn.2d at 499-500; see also, Turngren v. King County, 104 Wn.2d 293, 305-06, 705 P.2d 258 (1985); Bender, 99 Wn.2d at 594-96; Baines,114 Wn. App. at 40-48 (Morgan, J., concurring and dissenting in part).

88 Baines, 114 Wn App. at 46 (Morgan, J., concurring and dissenting in part)(footnotes omitted).

89 Baines, 114 Wn App. at 46 (Morgan, J., concurring and dissenting in part).

90 Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); G.D. Searle & Co. v. Federal Express Corp., 248 F. Supp. 2d 905, 907 (N.D. Cal. 2003).

91 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); Reassure Am. Life Ins. Co. v. Rogers, 248 F. Supp. 2d 974, 981 (D. Haw. 2003).

92 Cf. Hanson, 121 Wn.2d 552.

93 For a more complete discussion of this proposition, see Baines, 114 Wn. App. at 40-48 (Morgan, J., concurring and dissenting in part).

94 Nothing said herein precludes the trial court, on remand, from considering additional motions for summary judgment on Loeffelholz's and the County's claims for malicious prosecution. The only claim raised and briefed on appeal, and the only claim we have rejected, is that probable cause was established as a matter of law (i.e., so clearly that reasonable minds could not differ) merely because the federal judge

submitted the federal case to the federal jury.

95 Although the defendants also mention a counterclaim for negligence, they do not describe it, argue it, or cite any authority to support it. See Br. of Resp't at 71-72. Accordingly, we decline to consider it. State v. Hoffman, 116 Wn.2d 51, 71, 804 P.2d 577 (1991) (court need not consider arguments not supported by authority); Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co., 104 Wn. App. 597, 606, 17 P.3d 626 (2000) (same),review denied, 143 Wn.2d 1023 (2001).

96 Br. of Resp't at 71.

97 The defendants cite only White v. State, 131 Wn.2d 1, 929 P.2d 396 (1997)and Right-Price Recreation, 146 Wn.2d 370, 46 P.3d 789. In White, the plaintiff sued because her employer, the defendant, had allegedly altered her employment in retaliation for her having made a whistle-blower report. The evidence was insufficient to avoid summary judgment. The defendant had not sued the plaintiff, so the court did not consider or rule on whether a person can violate sec. 1983 merely by bringing a lawsuit. In Right-Price Recreation, the court found that the plaintiffs had failed to produce sufficient evidence of defamation and that the defendants were immune. The
court did not consider or hold that the mere bringing of a defamation lawsuit violates sec. 1983.

98 New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

99 Fite v. Lee, 11 Wn. App. 21, 27-28, 521 P.2d 964, review denied, 84 Wn.2d 1005 (1974).
100 Batten v. Abrams, 28 Wn. App. 737, 745, 626 P.2d 984, review denied, 95 Wn.2d 1003 (1981) (quoting Hoppe v. Klapperich, 224 Minn. 224, 231, 28 N.W.2d 780 (1947)).
101 Batten, 28 Wn. App. at 746 (W. Prosser, Torts sec. 121, at 856-58 (4th ed. 1971)).
102 See RCW 42.30.030 ('All meetings of the governing body of a public agency shall be open and public') (emphasis added); RCW 42.30.060 ('No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public')(emphasis added).
103 RCW 42.30.020(1).
104 See RCW 42.30.030 ('All meetings of the governing body of a public agency shall be open and public') (emphasis added); RCW 42.30.060 ('No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public')(emphasis added); RCW 42.30.020(2) (''Governing body' means the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.') (emphasis added).
105 Salmon for All v. Dep't of Fisheries, 118 Wn.2d 270, 276-77, 821 P.2d 1211 (1992).
106 See RCW 42.30.030 ('All meetings of the governing body of a public agency shall be open and public') (emphasis

added); RCW 42.30.060(1) ('No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public') (emphasis added); RCW 42.30.020(4) ('Meeting' means a meeting 'at which action is taken'); RCW 42.30.020(3) (''Action' means the transaction of the official business of a public agency by a governing body').

107 Wood, 107 Wn. App. at 564 (OPMA 'not violated if less than a majority of the governing body meet'); In re Recall of Beasley, 128 Wn.2d 419, 427, 908 P.2d 878 (1996) (OPMA not violated 'if fewer than a majority meet together on any one occasion').

108 See RCW 42.30.030 ('All meetings of the governing body of a public agency shall be open and public'); RCW 42.30.060(1) ('No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public'); RCW 42.30.020(4) ('Meeting' means a meeting 'at which action is taken')(emphasis added); RCW 42.30.020(3) (''Action' means the transaction of the official business of a public agency by a governing body') (emphasis added).

109 Miller v. City of Tacoma, 138 Wn.2d 318, 325, 979 P.2d 429 (1999) (city council 'took action' in executive session); Estey v. Dempsey, 104 Wn.2d 597, 604, 707 P.2d 1338 (1985) (''Action' means the transaction of the official business . . . and does not automatically occur when a majority of the members of a governing body gather together, RCW 42.30.070.'); Schmitt v. Cape George Sewer Dist. No. One, 61 Wn.

App. 1, 7, 809 P.2d 217 (1991) ('Although it appears that some discussion occurred at the February 28 meeting . . . , the commissioners took no formal action . . .'); In re Recall of Roberts, 115 Wn.2d 551, 554, 799 P.2d 734 (1990) ('A majority of the members of a governing body are not prohibited from gathering together for purposes other than a regular or special meeting, so long as they take no 'action.'').

110 RCW 42.30.030.

111 RCW 42.30.060(1).

112 RCW 42.30.040.

113 RCW 42.30.120(1); Wood, 107 Wn. App. at 558.

114 RCW 42.30.120(2); Protect the Peninsula's Future v. Clallam County, 66 Wn. App. 671, 678, 833 P. 2d 406 (1992), review denied, 121 Wn.2d 1011 (1993).

115 RCW 42.30.060(1).

116 RCW 42.30.130.

117 See RCW 42.30.020(2); Salmon for All v. Dep't of Fisheries, 118 Wn.2d at 276-77.

118 Former RCW 29.62.015(3) ('The county canvassing board may . . . delegate in writing, or at a public meeting, the performance of any task assigned by law to the board.'); Laws of 1995, ch. 139, sec. 1.

119 See RCW 42.30.030, .060.

120 RCW 42.30.020(2); Refai v. Cent. Washington Univ., 49 Wn. App. 1, 13, 742 P.2d 137 (1987) (faculty committee was not 'governing body' due to lack of policy-making authority), review denied, 110 Wn.2d 1006 (1988). Compare Cathcart v. Andersen, 85 Wn.2d 102, 107, 530 P.2d 313 (1975) (faculty was 'governing body' where it had policy-making authority).

In neither of these cases was it disputed that a meeting had been held. In our case, by way of contrast, the evidence does not show that a meeting was ever held or that those participating had policy-making authority.

121 E.g., RCW 29.54.025(1) (proceedings at counting center 'shall be open to the public'); see also WAC 434-261-010, effective November 13, 1997.

122 The defendants also argue that the County did not produce tapes of other interviews by Lt. Bisson and the identities of 30 election workers who were at the warehouse on October 31, 1996. We cannot find anywhere in the record where the defendants called these items to the trial court's attention, and we decline to consider discovery problems that were not called to the trial court's attention. RAP 2.5(a); State v. Long, 58 Wn.2d 830, 834, 365 P.2d 31 (1961), cert. denied, 374 U.S. 850 (1963); Bank of Am. NT & SA v. David W. Hubert, P.C., 115 Wn. App. 368, 384, 62 P.3d 904 (2003).

123 Rivers v. Washington State Conf. of Mason Contractors, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002); Washington State Physicians Ins. Exch. & Ass'n v.Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

124 Defendants assert that the County's counsel 'concealed' the tapes and the file, and thus that the County's counsel engaged in willful misconduct.Br. of Resp't at 64. The trial court did not make any such findings.

125 CP at 3412. The deposition was published on August 21, 2000.

126 On August 23, 2000, at the end of the plaintiffs' case in chief, the trial court orally summarized as follows:

> I believe we do not have the inevitable tape in evidence. And I also rule that the sanctions or whatever we've talked about for the last ten days on this discovery issue is of no concern to me. You've got the tape; you've had the transcript the whole time. I want to make it clear if I haven't. I don't think there's any bad faith. I think you have the tape now. Neither side used this transcript. And anything that you can say about lack of discovery, you've got the tape; you've had the transcript the whole time.. . . . We got the tape. The tape was before us. The tape became a nonissue here and I've ruled as a matter of law. I don't want to hear another word about discovery.

RP at 1130-33.
127 See RP at 982, 994.
128 We reject the defendant's reliance on Fisons, 122 Wn.2d 299. The circumstances there were much more egregious than those here.
129 Br. of Resp't at 73.
130 Br. of Resp't at 74. See Newton, 109 Wn.2d at 79.
131 RP at 1091-92.
132 RP at 1365.
133 E.g., RP at 1375 (arguing the IA complaint as evidence of Bockwinkel's and Coffey's hostility toward Loeffelholz).

134 E.g., RP at 1381 ('Did you believe {them} when they went to Internal Affairs and said, 'Gee, Internal Affairs? I didn't know it was Internal Affairs.'').
135 RP at 1429 ('They went and they told I.A. . . . that this had happened. They tried to file an assault charge against Billy Joe Arends and they wouldn't let them.')
136 RP at 1429 (emphasis added).
137 RP at 1443.
138 Ex. 134 at 3.